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IN THE

Supreme Court of the United States

October Term, 1987

FOREIGN CREDIT INSURANCE ASSOCIATION,

Petitioner,

v.

NU-AIR MANUFACTURING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

HENRY A. HUBSCHMAN
(Counsel of Record)
ELLIOT E. POLEBAUM
ROBERT P. PARKER
MIRA N. MARSHALL
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON
(A Partnership Including
Professional Corporations)
1001 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20004-2505
(202) 639-7000

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether the doctrines of official immunity and derivative sovereign immunity bar negligent misrepresentation suits against an association of private insurers serving as the Federal Government's agent under the congressionally mandated export credit insurance program.

2. Whether contract suits on insurance policies issued pursuant to the Federal Government's export credit insurance program are governed by a uniform body of federal law, or by the particularized laws of the 50 States and the District of Columbia.

PARTIES TO THE PROCEEDING AND RULE 28.1 LIST

In addition to the petitioner and respondent named in the caption, Frank B. Hall & Co. of New York d/b/a Intercredit Agency was a defendant in the district court and an appellee in the court of appeals.

Pursuant to Supreme Court Rule 28.1, petitioner Foreign Credit Insurance Association ("FCIA") has set forth in the appendix at 51a, a list of FCIA's members at the time respondent filed this suit. These entities were named defendants in the district court and appellees in the court of appeals. However, by virtue of an agreement between FCIA and the Export-Import Bank of the United States entered into prior to the initiation of this lawsuit, FCIA's members have no financial interest in the outcome of this case. Pursuant to Rule 19.6, petitioner has informed the Clerk of the Court of its belief that FCIA's individual members have no interest in the outcome of this petition and will not participate in this proceeding.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 28.1 LIST	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
A. Factual Background	5
B. Opinions Below	6
REASONS FOR GRANTING THE WRIT	8
A. This Court Should Review The Eleventh Circuit's Decision To Clarify The Immunity From Non-Constitutional Tort Liability Of Private Participants In Federal Government Insurance Programs	12
1. Two Courts of Appeals Have Recognized the Immunity of Private Participants in Federal Government Insurance Programs.	13
2. The Decision Below Conflicts With Appellate Decisions On Both Official Immunity and Derivative Sovereign Immunity	14
3. The Court Below Was Wrong in Determining That Eximbank Does Not Enjoy Sovereign Immunity from Negligent Misrepresentation Suits	16

PAGE

B. The Court Should Review The Eleventh Circuit's Decision To Settle Whether State Or Federal Law Applies To Insurance Contracts Issued Jointly By Public And Private Entities Pursuant To Federal Government Insurance Programs .. 17

1. The Decision Below Undermines Uniformity of Decision in the Export Credit Insurance Program 18

2. The Decision Below Requires Eximbank and FCIA to Guess at the Law Applicable to the Export Credit Insurance Program .. 18

3. The Decision Below Conflicts With the Decisions of This Court and of at Least Three U.S. Courts of Appeals 20

CONCLUSION 23

TABLE OF AUTHORITIES

	PAGE
Anderson v. *Occidental Life Insurance Co.*, 727 F.2d 855 (9th Cir. 1984) (per curiam)	4,14
Atlas Pallet, Inc. v. *Gallagher*, 725 F.2d 131 (1st Cir. 1984)	4,21
Augustine v. *McDonald*, 770 F.2d 1442 (9th Cir. 1985)	15
Barr v. *Matteo*, 360 U.S. 564 (1959)	12
Becker v. *Philco Corp.*, 372 F.2d 771 (4th Cir.), *cert. denied*, 389 U.S. 979 (1967)	14
Beverly v. *Macy*, 702 F.2d 931 (11th Cir. 1983)	21,22
Bor-Son Bldg. Corp. v. *Heller*, 572 F.2d 174 (8th Cir. 1978)	17
Bradley v. *Computer Sciences Corp.*, 643 F.2d 1029 (4th Cir.), *cert. denied*, 454 U.S. 940 (1981)	14
Brazil v. *Giuffrida*, 763 F.2d 1072 (9th Cir. 1985)	4,21
Bushman v. *Seiler*, 755 F.2d 653 (8th Cir. 1985)	4,13
Butz v. *Economou*, 438 U.S. 478 (1978)	12
Claus v. *Gyorkey*, 674 F.2d 427 (5th Cir. 1982)	15
Clearfield Trust Co. v. *United States*, 318 U.S. 363 (1943)	17,18
Commonwealth of Pennsylvania v. *National Ass'n of Flood Insurers*, 520 F.2d 11 (3d Cir. 1975)	19
Davis v. *Scherer*, 468 U.S. 183 (1984)	13
Edelman v. *Federal Housing Administration*, 382 F.2d 594 (2d Cir. 1967)	17
Federal Crop Insurance Corp. v. *Merrill*, 332 U.S. 380 (1947)	8,19
Fine Wear Mfg. Co. v. *Giuffrida*, 580 F. Supp. 472 (E.D.N.Y. 1984)	21
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982)	12,16
Holmes v. *Eddy*, 341 F.2d 477 (4th Cir.) (per curiam), *cert. denied*, 382 U.S. 892 (1965)	17
Lovell Mfg. v. *Export-Import Bank*, 777 F.2d 894 (3d Cir. 1985)	19

PAGE

Matranga v. *Travelers Insurance Co.*, 563 F.2d 677 (5th Cir. 1977) (per curiam) 14

Norton v. *McShane*, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965) 16

Oyler v. *National Guard Ass'n*, 743 F.2d 545 (7th Cir. 1984) 15

Peterson v. *Weinberger*, 508 F.2d 45 (5th Cir.), *cert. denied*, 423 U.S. 830 (1975) 14

Potter v. *Giuffrida*, 635 F. Supp. 99 (S.D. Ohio 1986) . 21

Ricci v. *Key Bancshares of Maine, Inc.*, 768 F.2d 456 (1st Cir. 1985) 16

Schell v. *National Flood Insurers Ass'n*, 520 F. Supp. 150 (D. Colo. 1981) 21

United States v. *County of Allegheny*, 322 U.S. 174 (1944) 17

United States v. *Parish of St. Bernard*, 756 F.2d 1116 (5th Cir. 1985), *cert. denied*, 474 U.S. 1070 (1986) . 4,21

United States v. *Seckinger*, 397 U.S. 203 (1970) 17

West v. *Harris*, 573 F.2d 873 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979) 4,11,21

Westfall v. *Erwin*, 785 F.2d 1551 (11th Cir. 1986) (per curiam), *cert. granted*, 107 S.Ct. 1346 (1987) . 12

Williamson v. *United States*, 815 F.2d 368 (5th Cir. 1987) 15

Statutes

7 U.S.C. § 1507(c) 8

12 U.S.C. § 635 ..... *passim*

12 U.S.C. § 1749bbb-10a(b) 10

12 U.S.C. § 1749bbb-12 8

28 U.S.C. § 1254(1) 2

Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.* 17

Federal Tort Claims Act, 28 U.S.C. § 2680(h) 7,17

42 U.S.C. §§ 1395h, 4001, 4051, 4081-82 8,10

43 U.S.C. § 1817(g)(2) 8

46 U.S.C. §§ 1287, 1289(d) 8

PAGE

Legislative Materials

H. Rep. No. 1476, 90th Cong., 2d Sess (1968) 11
H. Rep. No. 1126, 87th Cong., 1st Sess. (1961) 10
H. Rep. No. 92-303, 92d Cong., 1st Sess. (1971) 10
H. Rep. No. 95-235, 95th Cong., 1st Sess. (1977) .. 10
H. Rep. No. 320, 83d Cong., 1st Sess. (1953) 11

Miscellaneous

General Accounting Office, Export Credit Insurance: Assessment of Export Import Bank's Role, No. GAO/NSIAD-87-189 (September 1987) 9,10,11

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Foreign Credit Insurance Association ("FCIA") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-captioned proceeding on July 24, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 822 F.2d 987, and is reprinted in the appendix hereto at 1a.

The memorandum decision of the United States District Court for the Middle District of Florida (Kovachevich, J.) has not been reported. It is reprinted in the appendix hereto at 24a.

JURISDICTION

The court of appeals entered its judgment and order remanding this case to the district court on July 24, 1987. *See* 22a-23a. FCIA filed a timely petition for rehearing or rehearing by the court of appeals *en banc*. The court of appeals denied FCIA's petition on August 31, 1987. *See* 21a.

On November 10, 1987, Justice O'Connor ordered that the time for filing this petition for a writ of certiorari be extended to and including December 29, 1987.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

12 U.S.C. § 635 provides:

> (a)(1) There is created a corporation with the name Export-Import Bank of the United States, which shall be an agency of the United States of America. The objects and purposes of the bank shall be to aid in financing and to facilitate exports and imports and the exchange of commodities and services between the United States or any of its Territories or insular possessions and any foreign country or the agencies or nationals thereof. In connection with and in furtherance of its objects and purposes, the bank is authorized and empowered to . . . guarantee, insure, coinsure, and reinsure against political and credit risks of loss . . . .
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> * * *
>
> (b)(1)(A) It is the policy of the United States to foster expansion of exports of manufactured goods, agricultural products, and other goods and services, thereby contributing to the promotion and maintenance of high levels of employment and real income and to the increased development of the productive resources of the United States. To meet this objective in all its programs, the Export-Import Bank is directed, in the exercise of its functions, to provide guarantees, insurance, and extensions of credit at rates and on terms and other conditions which are fully competitive with the Government-supported rates and terms and other conditions available for the financing of exports of goods and services from the principal countries whose exporters compete with United States exporters . . . .
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> * * *
>
> (c)(2) The bank may issue such guarantees, insurance, coinsurance, and reinsurance to or with exporters, insurance companies, financial institutions, or others, or groups

thereof, and where appropriate may employ any of the same to act as its agent in the issuance and servicing of such guarantees, insurance, coinsurance, and reinsurance, and the adjustment of claims arising thereunder.

STATEMENT OF THE CASE

The Export-Import Bank of the United States ("Eximbank"), an agency of the United States government, directs our country's export credit insurance program. Pursuant to statutory authority, 12 U.S.C. § 635(c)(2), Eximbank in 1961 encouraged private insurers to form an unincorporated association, known as the FCIA,[1] to serve as Eximbank's agent in marketing, issuing and servicing export credit insurance policies. Eximbank has, since 1962, continuously appointed FCIA as its agent to market, issue and service export credit insurance policies designed and approved by Eximbank in order to fulfill the congressional mandate to expand U.S. exports. These policies protect U.S. exporters against the risk that foreign buyers of American goods or services will not pay due to either commercial or specified political reasons.[2] Under a single, unified insurance policy which contains one set of definitions, one set of exclusions, one set of agreements of the insured, and one set of other applicable terms and conditions, Eximbank is the insurer of the political risks of loss and FCIA's members are the named insurers of the commercial risks. Eximbank has always reinsured FCIA's members for losses arising out of commercial claims above certain agreed-upon levels. Since 1983, Eximbank has reinsured FCIA's members for all claims under the commercial risk coverage. *See* 12a.

Federal Government control of the export credit insurance program is complete: Eximbank exercises ultimate authority over the issuance of policies, the terms thereof, the premiums therefor,

1. FCIA is an unincorporated association of insurance companies.

2. The political risk provisions cover the foreign buyer's nonpayment as a result of such events as war, riot, nationalization of the buyer's business, or the buyer's inability to obtain dollars in a lawful market to satisfy a U.S. dollar obligation. The commercial risk provisions provide coverage against the buyer's default on its obligation to pay the policyholder for reasons other than those set forth in the political risk provisions.

and the acceptance or denial of political and significant commercial claims thereunder. The premiums set by Eximbank are subsidized by the Federal Government in accordance with the congressional directive that Eximbank provide insurance "at rates and on terms and other conditions which are fully competitive with the Government-supported rates and terms and other conditions available for the financing of exports of goods and services from the principal countries whose exporters compete with United States exporters." 12 U.S.C. § 635(b)(1)(A).

The Federal Government's export credit insurance program is part of the national commitment to increasing exports, 12 U.S.C. § 635(a)(1), and is an area of quintessential federal interest. In a period of skyrocketing trade deficits and international financial turmoil, the ability of U.S. companies to increase exports of U.S. goods and services abroad is all the more critical.

Notwithstanding these important national concerns, the Court of Appeals for the Eleventh Circuit struck two blows at the foundations of the Federal Government's export credit insurance program. In conflict with the decisions of other circuit courts of appeals regarding Federal Government insurance programs,[3] the Eleventh Circuit held that FCIA is not immune from suit for negligent misrepresentations committed in its role as the marketer and servicer of policies issued under the Federal Government's export credit insurance program. The court of appeals went on to attack Eximbank's status directly, concluding that Eximbank itself is not entitled to sovereign immunity from negligent misrepresentation suits despite the contrary directive of the Federal Tort Claims Act. The court of appeals compounded its divergence from the decisions of other courts of appeals[4] by further holding that state rather than federal law governs the rights

3. *Bushman* v. *Seiler*, 755 F.2d 653 (8th Cir. 1985); *Anderson* v. *Occidental Life Insurance Co.*, 727 F.2d 855 (9th Cir. 1984).

4. *Brazil* v. *Giuffrida*, 763 F.2d 1072 (9th Cir. 1985); *United States* v. *Parish of St. Bernard*, 756 F.2d 1116 (5th Cir. 1985), *cert. denied*, 474 U.S. 1070 (1986); *Atlas Pallet, Inc.* v. *Gallagher*, 725 F.2d 131 (1st Cir. 1984); *West* v. *Harris*, 573 F.2d 873 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979).

and duties of private participants in Federal Government insurance programs such as the export credit insurance program.

The decision below is a frontal assault on the Federal Government's export credit insurance program, and raises important questions of immunity from non-constitutional tort liability and of the applicability of state rather than federal law for all Federal Government insurance programs.

A. Factual Background

In early 1982, Nu-Air Manufacturing Company ("Nu-Air") applied to FCIA for an export credit insurance policy that would provide Nu-Air with political and commercial risk coverage for its export transactions. Concurrently, Nu-Air also applied for a special endorsement to the policy that would extend the policy's basic coverage to a large sale that Nu-Air contemplated making to a Nigerian buyer. Nu-Air understood that it needed the special endorsement, known as a Special Buyer Credit Limit ("SBCL"), to secure coverage under the policy for the large Nigerian transaction.[5] In March 1982, FCIA, in its capacity as Eximbank's agent, issued a quotation for the policy, which Nu-Air accepted. Subsequently, FCIA rejected Nu-Air's application for an SBCL endorsement because of a virtual economic collapse in Nigeria at that time.

Before FCIA rejected Nu-Air's SBCL application, Nu-Air's insurance broker apparently informed Nu-Air that Nu-Air could begin shipping to its Nigerian buyer. Nu-Air did so, and allegedly suffered a loss of $311,846.32 as a result of the Nigerian buyer's subsequent default. Nu-Air filed a claim with FCIA under the commercial risk coverage of its policy, which FCIA rejected on the ground that Nu-Air had no SBCL endorsement covering the Nigerian transaction.

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5. Basic coverage under export credit insurance policies typically permits insureds to make small sales up to a specified dollar amount per buyer (the "Discretionary Credit Limit"), subject to an aggregate for all buyers, without further review by Eximbank and FCIA. If the insured will have receivables in excess of the Discretionary Credit Limit, it needs to obtains an SBCL endorsement to insure the transaction.

Soon thereafter, Nu-Air filed its complaint in the district court. The complaint contains two counts against FCIA.[6] In the first count, Nu-Air alleges that a valid and binding insurance contract between FCIA and Nu-Air covered Nu-Air's loss in the Nigerian transaction. The second count alleges that FCIA negligently misrepresented to Nu-Air's broker, and through the broker to Nu-Air, that FCIA had approved the issuance of an SBCL covering Nu-Air's shipments to Nigeria.

Upon completion of discovery, FCIA, Nu-Air and Nu-Air's broker entered into a pre-trial order which included 143 stipulations of fact. Among other things, the parties stipulated that FCIA had acted as the agent of Eximbank within the scope of its authority, *see* 32a, and that Nu-Air had breached several of the terms and provisions of the policy, *see* 29a.[7] On the basis of these stipulated facts, FCIA moved the district court for summary judgment. Among the grounds urged by FCIA in support of its motion were: (1) as the agent of Eximbank, FCIA is immune from suits, such as Nu-Air's negligent misrepresentation claim, sounding in common-law tort; and (2) federal common law governs the rights and liabilities of parties to an insurance contract issued under a Federal Government insurance program, so that Nu-Air's failure to obtain and preserve coverage in accordance with the terms and provisions of its policy bars its recovery.

B. Opinions Below

The district court granted FCIA's motion for summary judgment. In pertinent part, the district court ruled:

> (G) FCIA was acting within its authority as the agent of the Export-Import Bank of the United States, and is

6. Nu-Air also sued its broker for breach of contract, negligence and negligent misrepresentation.

7. The only remaining disputed issue of fact in this case is whether FCIA advised Nu-Air's broker that FCIA had approved the SBCL endorsement or rather, as FCIA believes, whether Nu-Air's broker erroneously and unreasonably assumed FCIA had approved the SBCL endorsement when FCIA advised the broker it was issuing a policy quote.

immune from suit under Nu-Air's negligent misrepresentation claim.

See 49a. The court further held that Nu-Air's conceded violations of the policy terms barred its recovery.[8]

On appeal, the Eleventh Circuit reversed, rejecting application to FCIA of the doctrine of official immunity and the applicability of federal rather than state law to the Federal Government's export credit insurance program. With respect to official immunity, the court held that FCIA was subject to suit for its alleged negligent misrepresentations to Nu-Air, and specifically declined to follow other cases recognizing the immunity of private agents in Federal Government insurance programs. The court concluded that these cases recognizing immunity for private agents apply only to activity which furthers "paramount governmental objectives." *See* 14a. The court then held that immunizing FCIA from the tort alleged in Nu-Air's complaint would not serve any "worthwhile" purpose. *See id.*

In rejecting immunity for FCIA, the court further concluded that Eximbank itself, though an agency of the United States, would not be entitled to immunity from a negligent misrepresentation suit. Overlooking the immunity of federal agencies such as Eximbank from negligent misrepresentation suits as explicitly preserved in the Federal Tort Claims Act, 28 U.S.C. 2680(h), the court of appeals rested its conclusion on two grounds: (1) Eximbank's "entr[y] [into] the commercial sphere" by the issuance of insurance policies covering commercial ventures, and (2) the "sue and be sued" clause in Eximbank's enabling statute.

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8. The district court concluded:

> (F) Nu-Air's failure, until February 1983, to report to FCIA [the Nigerian buyer's] default ... bars Nu-Air from recovering against FCIA where Nu-Air was aware on or about August 31, 1982, that [the buyer] had defaulted on its obligation to make payment ....
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> * * *
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> (H) Nu-Air's failure to mail, prior to April 11, 1983, a Proof of Loss/Notice of Claim form, which FCIA received on April 18, 1983, bars Nu-Air's recovery here.

49a-50a.

Having determined that Eximbank would not be entitled to sovereign immunity from negligent misrepresentation suits, the court further found that FCIA was not entitled to derive immunity from Nu-Air's tort claim based on Eximbank's sovereign status.

Concerning the applicability of federal common law, the court of appeals rejected FCIA's reliance on both *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380 (1947), and the decisions of federal courts of appeals recognizing the applicability of federal law to Federal Government insurance programs which include private participation. On the basis of its perception that this case involves "private contractual arrangements between private litigants," 12a, rather than the rights and duties of Eximbank's agent in connection with the marketing, issuance and servicing of an export credit insurance policy and the insuring of commercial risks under a single policy issued jointly on behalf of Eximbank and FCIA, the court of appeals applied state law to reverse the district court.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's decision adversely affects two important aspects of the Federal Government's export credit insurance program. First, by refusing to recognize FCIA's immunity, the decision below has impaired FCIA's status as Eximbank's agent, and has called into question the status of all private entities which play critical roles in a variety of Federal Government insurance programs as intermediaries for or agents of the Federal Government.[9] The decision below, if allowed to stand, would undermine the proper functioning of the export credit insurance program. If every misunderstanding between FCIA and prospective insureds,

9. Currently, in addition to Eximbank's export-credit insurance program, federal agencies possess the statutory authority or mandate to engage private insurers as partners, agents or intermediaries in connection with federal health insurance (42 U.S.C. § 1395h), flood insurance (42 U.S.C. §§ 4001, 4051, 4081-82), crime insurance (12 U.S.C. § 1749bbb-12), war risk insurance (46 U.S.C. §§ 1287, 1289(d)), crop insurance (7 U.S.C. § 1507(c)), and oil pollution insurance (43 U.S.C. § 1817(g)(2)).

policyholders and brokers could potentially develop into a negligent misrepresentation suit not subject to early termination through the immunity defense, the disincentives to effective marketing and servicing of policies would be overwhelming. Without immunity from common law tort suits, one of two undesirable outcomes would ensue. Either FCIA's marketing and servicing duties would be restructured to avoid all risks, private sector participation in the program envisaged by Congress would be increasingly less viable,[10] and exports ultimately would decrease, or in light of the below-market premium rates set by Eximbank, 12 U.S.C. § 635(b)(1)(A), Eximbank would be forced to increase premiums or provide greater subsidies. In the end, the effectiveness of the Federal Government's export credit insurance program in achieving the congressional mandate to promote U.S. exports would be undermined.

Second, the court of appeals' decision, in an abrupt departure from consistent federal appellate precedent, throws into confusion the question of which body of law governs the rights and duties of all participants in the export credit insurance program, as well as all other Federal Government insurance programs. Under the Eleventh Circuit's decision, Eximbank and FCIA are left in the impossible position of having to divine the body of law which might apply to claims filed years after liability-affecting decisions are made. The potential application of the laws of more than 50 jurisdictions to a government program would result in identically situated U.S. exporters receiving disparate treatment under a national program, would increase costs and premiums (ultimately reducing exports), and would undermine the viability of the congressionally mandated private sector role in this government program. In short, the Federal Government's export credit

10. Following large losses on claims arising out of the third world debt crisis in the early 1980's, private sector participation in the program was reduced to a historic low. Efforts to enhance private sector participation in this congressionally established program, *see* General Accounting Office, Export Credit Insurance: Assessment of Export Import Bank's Role, at 20-21, No. GAO/NSIAD-87-189) (September 1987) ("GAO Report"), would be frustrated in the absence of immunity from common law tort suits.

insurance program cannot operate effectively and fulfill the congressional mandate to increase U.S. exports where the governing legal framework is uncertain.

The Federal Government's export credit insurance program, in this time of international financial instability and trade tension, is vitally important to our country.[11] It has long been national policy for Eximbank, through its various programs including export credit insurance, to promote exports of U.S. goods and services.[12] Congress authorized the export credit insurance program, among other reasons, because of its concern that, in the absence of a government program, the private sector would not, as it theretofore had not, fill the national need for export credit insurance.[13] Congress authorized the participation of private insurers and expressed the hope that they would be extensively used in delivering export credit insurance, recognizing that, in

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11. Eximbank is a member of the International Union of Credit and Investment Insurers, a consortium of similar institutions from 32 countries which seeks cooperation on the terms on which governments offer export credit insurance so as to reduce predatory trade practices in this area. *See* GAO Report *supra* at 12-13.

12. 12 U.S.C. § 635(a)(1); H. Rep. No. 95-235, at 2-3, 95th Cong., 1st Sess., 1977 U.S. Code Cong. & Ad. News 3126-27; H. Rep. No. 92-303, 92d Cong., 1st Sess., 1971 U.S. Code Cong. & Ad. News 1417. In extending and amending the Eximbank legislation in 1977, Congress expressed concern with burgeoning trade deficits. In figures that seem quaint by comparison to today's levels, the House Committee which oversees Eximbank's insurance program fretted that the "U.S. trade balance was in deficit by $5.9 billion in 1976 .... Current estimates call for an overall trade deficit in 1977 of as much as $15 billion." H. Rep. No. 95-235, *supra*, at 3.

13. H. Rep. No. 1126, 87th Cong., 1st Sess., 1961 U.S. Code Cong. & Ad. News 3005-3007. Congress has authorized other federal insurance programs to fill a private sector vacuum. *See, e.g.*, 42 U.S.C. § 4001(b) ("The Congress also finds that (1) many factors have made it uneconomic for the private insurance industry alone to make flood insurance available to those in need of such protection on reasonable terms and conditions; but (2) a program of flood insurance with large scale participation of the Federal Government and carried out to the maximum extent practicable by the private insurance industry is feasible and can be initiated."); 12 U.S.C. § 1749bbb-10a(b) ("Upon determining . . . that . . . a critical market unavailability situation for crime insurance then exists in any State . . . the Director is authorized to make crime insurance available at affordable rates within such State through the facilities of the Federal Government.").

order for the Federal Government's export credit insurance program to be effective, it would have to rely on the private sector's experience and marketing talent.[14] Congress never suggested, however, that the participation of such parties meant that the export credit insurance program was not a program of national interest requiring the uniformity of interpretation and the consistency and predictability of outcome attendant to federal programs.

In a further reflection of the program's economic and political importance to the nation, Congress and Eximbank have retained strict control over the program. Congress has established the criteria (1) for setting the premiums to be charged, (2) the products and services to be insured, and (3) the countries to whom exporters may make insured shipments. *See* 12 U.S.C. § 635(b).[15] To ensure that the program promotes the policy choices made by Congress, Eximbank has always exercised ultimate authority over all decisions on the issuance of policies, the terms of coverage, and the evaluation of political claims and those commercial claims above a specified dollar amount. In addition, Eximbank has always borne substantial financial responsibility for the program.[16] Since October 1, 1983, under an agreement between Eximbank and FCIA, Eximbank has assumed even greater financial responsibility for the program. For commercial

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14. GAO Report, *supra* at 2; H. Rep. No. 1126, *supra* at 3007. Congress had previously authorized the participation of private insurers in an early Eximbank program providing war risk coverage as a cost-saving measure, because the expense of private participation "would be less than . . . if the bank itself were to assume entire operational responsibility for the program." H. Rep. No. 320, 83d Cong., 1st Sess., 1953 U.S. Code Cong.& Ad. News 1643, 1648.

15. *See* H. Rep. No. 1476, 90th Cong., 2d Sess., 1968 U.S. Code Cong. & Ad. News 2541, 2546. ("The intention of the legislation is to authorize the Bank to foster the foreign trade and long-term commercial interests of the United States by supporting transactions which may involve somewhat greater risks than those traditionally taken by the Bank under its basic charter.").

16. *Compare West* v. *Harris*, *supra*, 573 F.2d at 881, where the Fifth Circuit rested its decision to apply federal law to the flood insurance program in substantial measure on the fact that "the federal government participates extensively in the program both in a supervisory capacity and financially . . . ."

claims where FCIA is the nominal insurer, Eximbank is financially at risk because, under the agreement, it is obligated to indemnify FCIA in respect of claims paid.

The export credit insurance program is, therefore, a creature of Congress administered by Eximbank, and, like other Federal Government insurance programs, is designed to achieve important national objectives. However, the program's ability to achieve congressional policy is undermined when a previously uniform recognition of immunity from common law tort suits for private agents in Federal Government insurance programs is disturbed. Moreover, the program cannot function properly and achieve congressional goals unless Eximbank and FCIA are able to discern the legal standards applicable to them. This Court therefore should review the Eleventh Circuit's decision to resolve two crucial issues: (1) the immunity of FCIA from common-law tort liability,[17] and (2) the law, whether federal or state, applicable to the Federal Government's export credit insurance program.

A. This Court Should Review The Eleventh Circuit's Decision To Clarify The Immunity From Non-Constitutional Tort Liability Of Private Participants In Federal Government Insurance Programs

In a series of modern decisions beginning with *Barr* v. *Matteo*, 360 U.S. 564 (1959), this Court has reaffirmed the immunity of federal officials from suits sounding in non-constitutional tort arising from conduct within the scope of the official's authority. *See Harlow* v. *Fitzgerald*, 457 U.S. 800, 807-08 (1982); *Butz* v. *Economou*, 438 U.S. 478, 494 & n.21 (1978). The underpinning of the official immunity doctrine is "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Harlow* v. *Fitzgerald*, *supra*, 457 U.S. at 807, *quoting Butz* v. *Economou*, *supra*, 438 U.S. at 506. The Court

17. Now pending before this Court is a case involving the scope of the official immunity doctrine. *Westfall* v. *Erwin*, 785 F.2d 1551 (11th Cir. 1986) (per curiam), *cert. granted*, 107 S.Ct. 1346 (1987).

has also identified several "social costs" from lawsuits against government officials which justify the immunity: "These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." 457 U.S. at 814. Furthermore, the Court has recognized that "officials can act without fear of harrassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages. . . ." *Davis* v. *Scherer*, 468 U.S. 183, 195 (1984).

In accordance with these principles, each circuit that has reviewed the issue, except the Eleventh Circuit, has proscribed non-constitutional tort claims against private participants acting as the government's agent in connection with Federal Government insurance programs. The Eighth Circuit has held that the principles of official immunity established in *Barr*, *Butz* and *Harlow* prohibit such suits against private participants in federal insurance programs. The Ninth Circuit derives the private insurer's immunity from the immunity of its governmental principal; this court analyzed the tort claim under the doctrine of sovereign immunity. The Eleventh Circuit in its decision in this case stands alone in rejecting each line of authority.

1. Two Courts of Appeals Have Recognized the Immunity of Private Participants in Federal Government Insurance Programs.

The Eighth Circuit has drawn on official immunity principles to affirm the dismissal of a tort claim against the consultant to a private insurer which acted as an intermediary in the federal health insurance program. *Bushman* v. *Seiler*, 755 F.2d 653, 655-56 (8th Cir. 1985). Although noting that the defendant's "link to the government [was] indirect," 755 F.2d at 655, the court in *Bushman* concluded that the policies underlying the official immunity doctrine as enunciated in *Butz* compelled the

doctrine's application to federal insurance intermediaries. *Id.* at 656.[18]

The Ninth Circuit has adopted a different approach to uphold the private participant's immunity from common law tort liability. In *Anderson* v. *Occidental Life Insurance Co.*, 727 F.2d 855 (9th Cir. 1984) *(per curiam)*, the court held that the private participant's immunity is derived from the government's sovereign immunity.[19] The court reasoned that, in light of the agency relationship governing the private party's conduct, the United States is the real party in interest in lawsuits raising tort claims against the private insurer. "Accordingly, [under the sovereign immunity doctrine] the United States cannot be sued without its consent," and such claims are barred. *Anderson, supra*, 727 F.2d at 856.

2. The Decision Below Conflicts With Appellate Decisions On Both Official Immunity and Derivative Sovereign Immunity.

The Eleventh Circuit has now rejected the approaches of the Eighth Circuit (official immunity) and of the Ninth Circuit (derivative sovereign immunity). With respect to official immunity, the court below developed an analysis based on the nature of the activity engaged in by the government agent. Noting that some of the immunity decisions on which FCIA relied involved a defamation action by the subject of a government agent's investigative report, the court concluded that such government reports

18. The Fourth Circuit has not addressed the issue in the insurance arena, but it has drawn identical conclusions in the parallel context involving the liability of government contractors for actions taken pursuant to their delegated authority. *Bradley* v. *Computer Sciences Corp.*, 643 F.2d 1029 (4th Cir.), *cert. denied*, 454 U.S. 940 (1981); *Becker* v. *Philco Corp.*, 372 F.2d 771 (4th Cir.), *cert. denied*, 389 U.S. 979 (1967).

19. Several panels of the Fifth Circuit have analyzed the liability of private insurers under the rubric of sovereign immunity, although their reasoning suggests that they relied on the official immunity doctrine, *viz.* an insurer acting as the government's agent is immune from tort suits arising out of official conduct. *Matranga* v. *Travelers Insurance Co.*, 563 F.2d 677 (5th Cir. 1977) (per curiam); *Peterson* v. *Weinberger*, 508 F.2d 45 (5th Cir.), *cert. denied*, 423 U.S. 830 (1975).

are more *worthy* of protection than what the court disparagingly referred to as "misrepresentations [by FCIA] to its customers." 14a.

The Eleventh Circuit's comparison is fundamentally misleading. The court purported to compare government activity directed at uncovering fraud with alleged tortious activity by FCIA. An appropriate comparison would have been to compare government activity aimed at uncovering fraud with FCIA's government conferred mission as Eximbank's agent in the marketing, issuance and servicing of Eximbank/FCIA insurance coverage for an international commercial transaction, which coverage has been authorized by the Congress to help achieve national economic policy. *See* 11a, n.22. Depriving FCIA of immunity from negligent misrepresentation suits would, for the reasons discussed above, *supra* at 9, undermine that mission, impair the FCIA's national marketing efforts and run counter to express congressional policy favoring the private sector's involvement as Eximbank's agent.

In making the comparison that it did, the court of appeals concluded either that the uncovering of fraud is a more worthwhile governmental effort than the congressional policy of promoting U.S. exports or that defamation is more defensible than negligent misrepresentation. The court is ill-situated to make the former judgment in the teeth of express congressional policy favoring increased U.S. exports, and the latter distinction between types of common law torts is contradicted by prevailing case law. The courts of appeals uniformly have concluded that the immunity recognized in *Barr* is available in connection with all types of state law tort claims, from negligence actions to actions seeking damages for intentional torts.[20] In *Harlow* v.

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20. *See Williamson* v. *United States*, 815 F.2d 368 (5th Cir. 1987) (tortious interference with property, misrepresentation); *Augustine* v. *McDonald*, 770 F.2d 1442 (9th Cir. 1985) (abuse of process); *Ricci* v. *Key Bancshares of Maine, Inc.*, 768 F.2d 456 (1st Cir. 1985) (misrepresentation, negligence, defamation, intentional infliction of emotional distress); *Oyler* v. *National Guard Ass'n*, 743 F.2d 545 (7th Cir. 1984) (conspiracy to defraud); *Claus* v. *Gyorkey*, 674 F.2d 427 (5th Cir. 1982) (misrepresentation); *see also Norton* v.

Fitzgerald, supra, this Court described the official immunity doctrine as an "absolute immunity from *suits at common law*." 457 U.S. 807-08 (emphasis added). Clarification by this Court of the standard governing official immunity from tort liability for private participants in Federal Government insurance programs is necessary to eliminate the threat from the decision below to the effective functioning of the Federal Government's export credit insurance program.

The Eleventh Circuit's derivative sovereign immunity holding equally threatens the effectiveness of the export credit insurance program. The court of appeals disabled itself from following the Ninth Circuit's analysis in *Anderson, supra*, when the court below erroneously concluded that "in the present case ... Eximbank and the United States are not financially at risk." 15a. In fact, Eximbank was at risk on the policy issued to Nu-Air as it has been on every policy ever issued under the export credit insurance program. With respect to Nu-Air's claim, Eximbank would bear the financial impact of any judgment that Nu-Air might recover against FCIA by virtue of the October 1, 1983 agreement between Eximbank and FCIA.

3. The Court Below Was Wrong in Determining That Eximbank Does Not Enjoy Sovereign Immunity from Negligent Misrepresentation Suits.

The Eleventh Circuit's determination that FCIA is not immune from negligent misrepresentation suits also rested on the erroneous premise that FCIA's principal, Eximbank, an agency of the United States, is not entitled to sovereign immunity from negligent misrepresentation suits. This conclusion is also worthy of review by this Court. In deciding that Eximbank would not be entitled to sovereign immunity in the circumstances of this case,[21] the Eleventh Circuit relied on the "sue and be sued" clause in

McShane, 332 F.2d 855, 859-60 & n.5 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965).

21. In its complaint, Nu-Air also sued Eximbank. Early in the proceedings, Nu-Air dismissed its claims against Eximbank, and Eximbank has not directly participated in the litigation since that time.

Eximbank's enabling statute.[22] The court of appeals evidently overlooked the provision of the Federal Tort Claims Act which preserves the immunity of federal agencies such as Eximbank from negligent misrepresentation suits despite such "sue and be sued" clauses.[23] The court of appeals' startling conclusion in an area as sensitive as the government's entitlement to sovereign immunity deserves review by this Court.

B. This Court Should Review The Eleventh Circuit's Decision To Settle Whether State Or Federal Law Applies To Insurance Contracts Issued Jointly By Public And Private Entities Pursuant to Federal Government Insurance Programs

This Court has ruled in connection with the Federal Government's nationwide programs that federal common law should provide the rule of decision so as to avoid "the great diversity in results [that would arise from] making identical transactions subject to the vagaries of the laws of the several states." *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367 (1943). Specifically, this Court has held that "[t]he validity and construction of contracts through which the United States is exercising its constitutional functions, [and] their consequences on the rights and obligations of the parties, ... present questions of federal law not controlled by the law of any state." *United States* v. *County of Allegheny*, 322 U.S. 174, 183 (1944); *accord, United States* v. *Seckinger*, 397 U.S. 203, 209 (1970).

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22. 12 U.S.C. 635(a)(1) provides, as do the enabling statutes of many federal agencies, that Eximbank may "sue and be sued."

23. *See* 28 U.S.C. § 2679(a) ("The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency cognizable under [the Federal Tort Claims Act], and the remedies provided by [the Federal Tort Claims Act] in such cases shall be exclusive."). The courts of appeals have uniformly held that misrepresentation claims are "cognizable" under the Federal Tort Claims Act, but are barred by it under 28 U.S.C. § 2680(h). *See, e.g., Bor-Son Bldg. Corp.* v. *Heller*, 572 F.2d 174 (8th Cir. 1978); *Edelman* v. *Federal Housing Administration*, 382 F.2d 594 (2d Cir. 1967); *Holmes* v. *Eddy*, 341 F.2d 477 (4th Cir.) (per curiam), *cert. denied*, 382 U.S. 892 (1965).

1. The Decision Below Undermines Uniformity of Decision in the Export Credit Insurance Program.

The Eleventh Circuit's decision that state law rather than federal law applies in this case raises the very spectre anticipated by the *Clearfield Trust* line of cases. According to the Eleventh Circuit, the terms on which an insured acquires a policy issued under a Federal Government insurance program are governed by the vagaries of state insurance practice. Under the Eleventh Circuit's decision, the Federal Government's export credit insurance program, which reflects a national policy adopted by the Congress to promote U.S. exports, would be governed by over fifty sets of rules, procedures, statutes and regulations regarding the rights and obligations of insurers and insureds. Subjecting the program "to the vagaries of the laws of the several states," *Clearfield Trust, supra,* 318 U.S. at 367, would impose unanticipated costs and other burdens on the program, impede the congressional objective of promoting U.S. exports, and result in divergent treatment of similarly situated U.S. exporters under a national program. In legislating the use of private insurers in furtherance of the export credit insurance program, Congress never envisaged a program lacking in uniformity, certainty and predictability that application of state law would engender.

2. The Decision Below Requires Eximbank and FCIA to Guess at the Law Applicable to the Export Credit Insurance Program.

In deciding whether to apply federal or state law, the Eleventh Circuit artificially divided the export credit insurance program and the policies issued thereunder into supposed public and private components. It then held that state law governs FCIA's rights and obligations, while purportedly leaving "open the question of the extent to which federal law governs insurance contracts issued on behalf of Eximbank." 13a, n.24.[24] No court has

24. The court of appeals plainly failed to understand that the insurance policy issued to Nu-Air was in fact a single policy "issued on behalf of Eximbank." Indeed, every policy *ever* issued pursuant to the export credit insurance program has been a policy "issued on behalf of Eximbank."

ever drawn such a distinction for other Federal Government insurance programs,[25] and the distinction makes no sense in the export credit insurance arena.

If state law governs the rights and obligations of Eximbank, then under the court of appeals' decision, an entire federal program would be governed by state law. If, by contrast, federal law governs only Eximbank's rights and obligations, then the same definitions, conditions, exclusions and terms which are embodied in a single insurance policy and which apply equally to Eximbank and FCIA would be subject to different interpretations depending on whether events occurring years after a policy is issued give rise to a claim for political coverage (Eximbank's risk) or commercial coverage (FCIA's nominal risk).[26] Thus, whether a foreign buyer fails to pay the U.S. exporter because of an expropriation (political risk) rather than an insolvency (commercial risk) would dictate which body of law applies to actions taken years earlier, for example when a policy was issued, a premium accepted or some other liability-affecting step taken.[27] As a result, none of the parties to the policy—Eximbank, FCIA, and insured—would be able to discern whether fundamental policy

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25. In other federal insurance programs, private participants have also borne an underwriting risk. *See, e.g., Commonwealth of Pennsylvania* v. *National Ass'n of Flood Insurers*, 520 F.2d 11, 16-17 (3d Cir. 1975).

26. In *Lovell Mfg.* v. *Export-Import Bank*, 777 F.2d 894 (3d Cir. 1985), cited by the Eleventh Circuit, the court held only that government estoppel standards did not prevent assertion of a claim against FCIA for commercial risk coverage, and that ordinary estoppel standards would apply. The court did not decide whether those ordinary estoppel standards would be drawn from federal law or state law. Nonetheless, the decision in *Lovell* suffers from one of the same infirmities afflicting the Eleventh Circuit's opinion: decision-making by Eximbank and FCIA must be made in a legal vacuum.

27. The instant case presents an example of the absurd position the Federal Government faces as a result of this bifurcated approach. The Eleventh Circuit held that FCIA's acceptance of Nu-Air's premium estopped FCIA under Florida law from denying the claim. In the event Nu-Air had presented a political, rather than commercial claim, then under *Federal Crop Insurance Corp., supra*, an estoppel claim could not lie. At the time the premium was accepted, however, neither Eximbank nor FCIA knew whether any claim which might in the future be presented would be under the policy's commercial coverage or its political coverage.

provisions governing, for example, the filing of shipment reports, overdue account forms and claims will be interpreted in accordance with a uniform body of federal law, or rather will be subject to diverse state law.

In either situation—the application of state law to an entire federal program, or the unpredictable and capricious application of federal law in some instances and state law in others—the outcome is untenable, and the untenable outcomes are driven by the Eleventh Circuit's conclusion that FCIA's rights and obligations under the nation's export credit insurance program are subject to state law. It is inconceivable that Congress intended the Federal Government's export credit insurance program to be subject, either entirely or in substantial part, to divergent and inconsistent interpretation. Indeed, there is not a shred of evidence in the legislative history surrounding this program that Congress was doing anything less than defining paramount federal interests and the mechanism by which those interests would be advanced. Accordingly, review by this Court is essential at this time to determine whether federal law or state law applies to the Federal Government's export credit insurance program. Absent a decision by this Court, public and private participants in both the export credit insurance program and other Federal Government insurance programs will be deprived of the opportunity to conform their conduct to a body of law that is discernible at the time actions must be taken, commitments fixed or other decisions made.

3. The Decision Below Conflicts With the Decisions of This Court and of at Least Three U.S. Courts of Appeals.

The Eleventh Circuit's decision draws into question the continued validity of the uniform body of federal appellate precedent holding that, for the reasons expressed in *Clearfield Trust*, federal law must control in determining the rights and liabilities of the parties to insurance policies issued pursuant to Federal Government insurance programs. To date, except for the Eleventh Circuit, all courts of appeals which have considered the issue,

including courts in the First, Fifth and Ninth Circuits, have concluded that federal common law governs the rights and liabilities of the parties to an insurance contract issued under a Federal Government insurance program, notwithstanding the active participation of private insurers. *See Brazil* v. *Giuffrida*, 763 F.2d 1072, 1075 (9th Cir. 1985); *United States* v. *Parish of St. Bernard*, 756 F.2d 1116, 1121 (5th Cir. 1985), *cert. denied*, 474 U.S. 1070 (1986); *Atlas Pallet, Inc.* v. *Gallagher*, 725 F.2d 131, 138 (1st Cir. 1984); *Beverly* v. *Macy*, 702 F.2d 931, 935-36 (11th Cir. 1983); *West* v. *Harris* , 573 F.2d 873, 880-82 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979).[28]

In *West* v. *Harris*, for example, a case involving the federal flood insurance program, the National Flood Insurers Association, an organization whose role was identical in all material respects to FCIA's, was a named defendant.[29] The court of appeals held that the Federal Government's interests in the program mandated the application of uniform principles of federal law:

> Since the flood insurance program is a child of Congress, conceived to achieve policies which are national in scope, and since the federal government participates extensively in the program both in a supervisory capacity and financially, it is clear that the interest in uniformity of decision present in this case mandates the application of federal law.

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28. The idiosyncratic nature of the Eleventh Circuit's decision is further highlighted by the multitude of district court decisions consistently holding that uniform federal law must govern Federal Government insurance programs. *E.g.*, *Potter* v. *Giuffrida*, 635 F. Supp. 99 (S.D. Ohio 1986) (crime insurance); *Fine Wear Mfg. Co. v. Giuffrida*, 580 F. Supp. 472 (E.D.N.Y. 1984) (crime insurance); *Schell* v. *National Flood Insurers Ass'n*, 520 F. Supp. 150 (D. Colo. 1981) (flood insurance).

29. In *West v. Harris*, the court stated that the "change in parties [from private insurers to the federal government] has no effect on the rights of these plaintiffs under the policies issued to them." 573 F.2d at 875 n.1. Thus the court specifically held that federal law applied with regard to both the public and private participants in the program.

573 F.2d at 881. This description and reasoning applies with equal force to the export credit insurance program.[30] Because the Eleventh Circuit's decision in this case is both unfaithful to *Clearfield Trust* and in conflict with decisions in several courts of appeals, review by this Court is now appropriate.

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30. The Eleventh Circuit is at odds with its own prior decision on the issue of applicable law. The decisions in this case and in *Beverly* v. *Macy*, *supra*, which applied federal law to the national flood insurance program, highlight the confusion created by the ruling below.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Eleventh Circuit to review the decision in this case.

Respectfully submitted,

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Henry A. Hubschman
(Counsel of Record)
Elliot E. Polebaum
Robert P. Parker
Mira N. Marshall
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON
(A Partnership Including
Professional Corporations)
1001 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20004-2505
(202) 639-7000

Attorneys for Petitioner

Dated: December 29, 1987

APPENDIX

NU-AIR MANUFACTURING COMPANY,
a Florida Corporation,
Plaintiff-Appellant,

v.

FRANK B. HALL & CO. OF NEW YORK, a corporation incorporated under the laws of the State of New York, doing business as Intercredit Agency, Aetna Casualty and Surety Company, Inc., *et al.*,
Defendants-Appellees.

No. 86-3359
United States Court of Appeals,
Eleventh Circuit

July 24, 1987

Rehearing and Rehearing En Banc
Denied Aug. 31, 1987

Before TJOFLAT and VANCE, Circuit Judges, and ATKINS,* Senior District Judge.

VANCE, Circuit Judge:

This appeal arises out of a manufacturer's suit against its insurer and insurance broker for misrepresentation, negligence, and breach of contract. The district court granted summary judgment for defendants on all claims. We reverse on all counts.

I. Facts and Procedural History

Nu-Air Manufacturing Co. (hereinafter "Nu-Air") is a Florida Corporation engaged in the business of assembling aluminum goods. In early 1982, Nu-Air negotiated with a Nigerian buyer for the sale of 12 containers of custom-made doors and windows. The Nigerian buyer was to pay half the price by letter of credit and the other half by sight draft upon delivery.

*Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Because of the large size of the order and Nu-Air's unfamiliarity with Nigerian practices, Nu-Air would not accept the order without first obtaining export insurance to cover that portion of the purchase price left unsecured by the letter of credit. Accordingly, Nu-Air designated Intercredit Agency (hereinafter "Intercredit") as its broker.[1] Intercredit, in turn, contacted an export insurer, Foreign Credit Insurance Association (hereinafter "FCIA").[2]

The standard FCIA master policy provides $200,000 in coverage. In order to insure a specific transaction beyond this standard coverage, FCIA will issue a Special Buyer Credit Limit (hereinafter "SBCL"). Nu-Air completed an application for an SBCL in order to increase the $200,000 limit to $371,530.49. Jane Ferry, Intercredit's senior vice president, submitted to FCIA both an application for a master policy and an application for an SBCL.

FCIA frequently approves the master policy and SBCL together because the insured would not want to subscribe to the master policy without the SBCL. Jane Ferry testified that she marked the SBCL application "approved per Michele" after Michele Milone, an FCIA sales representative, telephoned on March 3, 1982 FCIA's approval of both the master policy and SBCL applications. Milone agrees that she telephoned Ferry with a quotation for a master policy, but denies that she communicated FCIA's approval of the SBCL.[3] That same day, Ferry informed Nu-Air that both the master policy and the SBCL had been approved. Nu-Air immediately accepted the Nigerian order, relying on Intercredit's word that insurance coverage was in place. In fact, FCIA had not yet completed the paperwork for

1. Intercredit, a division of one of the nation's largest insurance brokerage firms, specializes in the business of selling export credit insurance.

2. FCIA is an association of private insurance companies. FCIA was established in 1961 at the encouragement of the United States Export-Import Bank. *See generally Lovell Mfg. v. Export-Import Bank of the United States*, 777 F.2d 894, 895 (3rd Cir. 1985).

3. Ferry has dealt with FCIA on a daily basis for approximately 20 years. At the time of this transaction, Milone had only six months experience with FCIA in export credit insurance sales.

the SBCL and had only processed the standard $200,000 master policy.

On March 4, 1982, FCIA delivered to Intercredit a document containing a quotation for a master policy. This document specified a $200,000 limit and made no reference to the SBCL application. One week later, Intercredit forwarded the document to Nu-Air. Jack Healey, Nu-Air's comptroller, reviewed the quotation and executed the document, assuming that FCIA would increase the $200,000 limit to match the $371,530.49 SBCL, which, according to Intercredit, FCIA had already approved.[4] Soon afterwards, Intercredit returned the signed quotation to FCIA, along with Nu-Air's initial deposit towards the premiums. On March 24, 1982, Nu-Air received an FCIA policy. Nu-Air's policy did not include an SBCL endorsement.[5]

Because of import restrictions imposed by the Nigerian government, FCIA concluded that it could not issue Nu-Air an SBCL. On March 19, 1982, FCIA orally informed Intercredit, Nu-Air's broker, that FCIA had decided to withdraw Nu-Air's SBCL application. On April 2, 1982, FCIA mailed written confirmation of this decision to Nu-Air. Nu-Air did not receive this confirmation until April 12, 1982.[6] On March 16, 1982, Nu-Air had begun shipping the order to Jacksonville, Florida, the point of departure for Nigeria. By the time Nu-Air received the notice of cancellation, eight of the twelve containers had already been shipped to Jacksonville and Nu-Air had fabricated almost all of the remaining four.

Immediately after learning that FCIA would not issue an SBCL, Nu-Air contacted Ferry at Intercredit. Ferry informed

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4. Neither Intercredit nor FCIA delivered paperwork concerning the SBCL.

5. Ferry testified that she did not notice the disparity between the $371,530.49 SBCL for which Nu-Air applied and the $200,000 limit specified by Nu-Air's policy until the date of her deposition, a year and a half later. Ferry was not alarmed that she had not received SBCL paperwork because she was under the impression that FCIA had already approved SBCL coverage.

6. Nu-Air did not receive any warning that there were problems with the SBCL before this date.

Healey, the Nu-Air officer responsible for obtaining the insurance, that FCIA had not issued an SBCL and that Nu-Air would not have insurance coverage for the transaction.[7] Ferry advised Healey not to make the shipments. Nevertheless, Nu-Air continued to ship the containers to Jacksonville, and on April 30, 1982, Nu-Air shipped the entire order to Nigeria.[8] On August 15, 1982, the Nigerian buyer defaulted on the sight draft. Subsequent demands for payment met with no success.

In early 1983, Nu-Air notified FCIA of the overdue account and filed a claim under the SBCL. FCIA denied the claim, alleging that no coverage existed. FCIA now contends that Nu-Air failed to give notice or pay premiums within the time restrictions of the policy.

On January 30, 1984, Nu-Air filed this lawsuit against Intercredit and FCIA. Counts I and II of Nu-Air's complaint stated claims against FCIA for breach of insurance contract and negligent misrepresentation. Counts III, IV and V stated three separate claims against Intercredit. Count III alleged that Intercredit breached its oral agreement to procure and maintain insurance. Count IV alleged that Intercredit negligently failed to maintain coverage. Count V alleged that Intercredit negligently misrepresented the existence of coverage. The district court granted the defendants' motion for summary judgment on all counts.[9] We reverse on all counts.

II. The Breach of Contract Claim Against FCIA

We begin by noting that Florida recognizes oral insurance contracts. *Collins* v. *Aetna Ins. Co.*, 103 Fla. 848, 138 So. 369,

7. Neither party suggests in their briefs why *no* coverage was in place. Since it is undisputed that FCIA approved the $200,000 master policy, it appears to this court that at least $200,000 of coverage was in place at the time.

8. Pursuant to the terms of the contract, Nu-Air had to ship the entire order representing a sale price of $630,137.20 in order to collect the 50% portion of the sale covered by the letter of credit. Nu-Air claims that the shipment had little salvage value because it was custom-made to Nigerian specifications.

9. The district judge cited no legal authority of any kind to support her conclusions. None of the conclusions of law in the judge's opinion refer to Nu-Air's claims by count number.

370 (1931); *Monogram Products, Inc.* v. *Berkowitz*, 392 So.2d 1353, 1355 (Fla. Dist. Ct. App. 1980); *Burns* v. *Consolidated Am. Ins. Co.*, 359 So.2d 1203, 1207 (Fla. Dist. Ct. App. 1978); *State Farm Fire & Casualty Co.* v. *Hicks*, 184 So.2d 685, 686 (Fla. Dist. Ct. App.), *cert. denied*, 189 So.2d 634 (1966). Such a contract, like any other contract, results from an offer and an acceptance of that offer. *Rosin* v. *Peninsular Life Ins. Co.*, 116 So.2d 798, 801 (Fla. Dist. Ct. App. 1960). To be enforceable, the agreement must encompass the following essential terms: subject-matter, risk, amount of insurance, premium, duration of risk and identity of parties. *Collins* v. *Aetna Ins. Co.*, 138 So. at 370; *State Farm Fire & Casualty Co.* v. *Hicks*, 184 So.2d at 686.

Michele Milone relayed to Jane Ferry a policy quotation incorporating all of these essential terms.[10] A jury could find that this oral communication constituted an offer to enter into an insurance contract[11] despite the fact that the parties dispute the term in this offer specifying the amount of insurance.[12] Nu-Air contends that it manifested its assent on March 10, 1982 by sending FCIA

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10. According to Ferry, FCIA would customarily telephone Intercredit with the disposition of an SBCL application. If FCIA decided to accept the application, its representative would customarily communicate the details of the policy quotation during this phone call. Ferry and Milone both agree that Milone stated the parameters of the Nu-Air policy quotation during the course of the March 3 telephone conversation. Ferry testified that she jotted down these parameters, and Nu-Air has offered this notation as an exhibit.

11. While a "quotation" is usually considered to invite an offer rather than to make one, Restatement (Second) of Contracts § 26 comment c, Ferry's testimony that Milone's communication included all essential elements of an insurance contract and that the policy had been "approved" raises a jury question as to whether Nu-Air had reason to believe that the quotation was intended as an offer. *Id.; see* E. Farnsworth, *Contracts* § 3.10 at 126-27 (1982).

12. Florida follows the general rule that a broker engaged to procure insurance is the agent of the insured rather than the agent of the insurer. *See Empire Fire and Marine Ins. Co.* v. *Koven*, 402 So.2d 1352, 1353 (Fla. Dist. Ct. App. 1981); *AMI Ins. Agency* v. *Elie*, 394 So.2d 1061, 1062 (Fla. Dist. Ct. App. 1981); *Auto-Owners Ins. Co.* v. *Yates*, 368 So.2d 634, 636 (Fla. Dist. Ct. App.), *cert. denied*, 378 So.2d 351 (1979); 3 Couch on Insurance 2d § 25.95 (Rev. ed. 1984); 43 AmJur2d *Insurance* 113 (1982). Communicating an offer to Intercredit would therefore be tantamount to making the offer directly to Nu-Air. Ferry immediately communicated the parameters of the quotation to Jack Healey at Nu-Air.

an executed document specifying the policy quotation.[13] Nu-Air also sent FCIA an initial deposit on the premiums.[14] Thus a jury could find that a contract was made on that date. *See* 1 S. Williston, *A Treatise On The Law of Contracts* section 66 (3d ed. 1957 & Supp. 1986);[15] E. Farnsworth, *Contracts*, 136 (1982).[16]

To be sure, the parties dispute an important factual question: whether Michele Milone communicated FCIA's approval of Nu-Air's SBCL application at the same time she gave Jane Ferry the quotation on the master policy. A jury must decide whether FCIA offered to provide the full $371,530.49 in requested coverage or only the $200,000 in coverage that is standard for an FCIA master policy. If the jury believes Michele Milone, it may find that the final contractual term specifying the amount of insurance corresponded to the $200,000 limit that is standard for an FCIA master policy. Alternatively, if the jury believes Jane Ferry, it may find that this term corresponded to the amount specified in Nu-Air's SBCL application. This dispute does not alter our conclusion that a jury could find that a contract was entered into on March 10, 1982.

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13. Though this document specified the standard $200,000 aggregate limit, the SBCL would supersede this figure.

14. It is stipulated that Intercredit forwarded these materials to FCIA and that FCIA retained the premium deposit. Under Florida law, an acceptance becomes binding when it is communicated to the offeror. *See Mintzberg* v. *Golestaneh*, 390 So.2d 759, 760 (Fla. Dist. Ct. App. 1980); *Kendel* v. *Pntious*, 244 So.2d 543, 544 (Fla. Dist. Ct. App. 1971), *cert. discharged*, 261 So.2d 167 (1972).

15. The formation of a contract "depends not upon an actual meeting of the minds, but merely upon manifestations of assent. . . . " 1 S. Williston, *A Treatise on the Law of Contracts*, § 66 (3d ed. 1957); *See also* E. Farnsworth, *Contracts* § 3.6 at 114 (1982) (test is whether offeree's actions, judged by a standard of reasonableness, manifest an intention to accept).

16. Even if the policy quotation did not constitute an offer, under an alternate form of analysis a jury could find that FCIA's failure to notify Nu-Air that FCIA did not intend to accept Nu-Air's application constituted acceptance. *See* Restatement (Second) of Contracts § 69(1)(c). In any event, FCIA's retention of Nu-Air's initial deposit raises an issue of fact as to whether FCIA accepted Nu-Air's offer. *See* Restatement (Second) of Contracts § 69(2); *see, e.g., Empire Machine Co.* v. *Litton Business Telephone Sys.*, 115 Ariz. 568, 566 P.2d 1044 (1977).

Courts must determine the terms of a contract by ascertaining the intent of the parties at the time they enter into the agreement. *See, e.g., J&S Coin Operated Machines, Inc.* v. *Gottlieb*, 362 So.2d 38, 39 (Fla. Dist. Ct. App. 1978). The lower court, nevertheless, held that an agreement to provide the full $371,530.49 in requested coverage would be unenforceable because the master policy contemplated that FCIA would approve the SBCL "by written notification."[17] Although Nu-Air did not receive the final version of the master policy until March 24, the parties may have negotiated with this document in mind. Nevertheless, if FCIA informed Nu-Air that SBCL coverage had already been approved, this understanding became part of the final contract.

Florida law requires that we resolve a conflict between the provisions of an insurance contract so as to afford maximum coverage to the policyholder. *See Dyer* v. *Nationwide Mut. Fire Ins. Co.*, 276 So.2d 6, 8 (Fla. 1973); *Oliver* v. *United States Fidelity & Guar. Co.*, 309 So.2d 237, 238 (Fla. Dist. Ct. App.), *cert. denied*, 322 So.2d 913 (1975). This principle applies with even greater force when the draftsman of a form policy relies on inconspicuous language to defeat the very purpose for which the policy was procured. *See Braley* v. *American Home Assurance Co.*, 354 So.2d 904, 906 (Fla. Dist. Ct. App.), *cert. denied*, 359 So.2d 1210 (1978); *Roberson* v. *United Services Auto. Ass'n*, 330 So.2d 745, 746 (Fla. Dist. Ct. App. 1976), *cert. denied*, 342 So.2d 1104 (1976). Accordingly, if FCIA offered to provide full coverage, it may not rely on language in the master policy to defeat Nu-Air's legitimate expectation of full coverage. *See Braley*, 354 So.2d at 906.

To rehabilitate the lower court's reasoning, FCIA argues that the parties intended that the oral agreement would not become binding until reduced to a writing. If this was the intention of the

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17. Article IV.B. of the master policy provides: "The amount of the credit limit for any particular buyer shall be:

> 1. The amount of the Discretionary Credit Limit Authorized in the declarations; or
>
> 2. Such other amount as the Insurers shall approve by written notification to the Insured of a Special Buyer Credit Limit."

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parties, we would give it effect. *See Club Eden Roc, Inc.* v. *Tripmasters, Inc.*, 471 So.2d 1322, 1323-24 (Fla. Dist. Ct. App. 1985) (memorandum clearly stated that no rights or obligations will arise until the execution of a formal agreement), *review denied*, 482 So.2d 350 (Fla. 1986); *Shipley* v. *Ohio Nat'l Life Ins. Co.*, 199 F. Supp. 782, 783 (W.D. Pa. 1961) (insurance application required final contract to be in writing), *aff'd on other grounds*, 296 F.2d 728 (3rd Cir. 1961). The mere fact that the parties contemplated future writings does not evince this intent, however, and FCIA does not point to a whit of convincing evidence. *See Collins* v. *Aetna Ins. Co.*, 103 Fla. 848, 138 So. 369, 370 (Fla. 1931); Restatement (Second) of Contracts § 27 (1981).

If anything, the record shows that FCIA is notoriously slow in processing its paperwork. Nu-Air could accept the Nigerian contract and begin manufacturing containers only by relying upon its understanding that insurance coverage was in place. The fabric of commerce depends upon interlocking strands of contractual agreements. This fabric would unravel if the creation of contract rights and obligations depended solely upon the flow of paper.

The lower court also held that FCIA had properly withdrawn coverage pursuant to a termination clause in the master policy. The termination clause, however, provided that FCIA could only terminate coverage "upon thirty days prior written notice."[18] "Shipments" made before the effective date of termination would remain covered.[19] In the present case, all goods left the United

18. Article XI.J.2. provides:

> The policy may be terminated by the Insurers or the Insured upon 30 days prior written notice by either to the other. In the event of termination, the Insured shall not be liable for payment of any premium for any shipment made after the effective date of termination and the Insurers shall not be liable for any loss arising from any shipment made subsequent to such date.

We assume *arguendo* that this termination provision became part of the oral contract.

19. The parties vigorously dispute the meaning of the term "shipment." Nu-Air contends that "shipment" began on the date when the goods left Nu-Air's Tampa factory. Support for this construction comes directly from the policy which defines the "insured transaction" as a sale of products "shipped

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States for Nigeria on April 30, 1982. Nu-Air had no warning that there were problems with its insurance coverage until April 12. On that date, Nu-Air received written confirmation of FCIA's decision to withdraw the SBCL application.[20] Clearly, the April 12 communication did not give the requisite thirty days notice and therefore could not effectively terminate insurance coverage.

FCIA argues that Nu-Air received effective notice on March 19 when the insurance company informed Intercredit that Nu-Air's SBCL application had been rejected. We disagree for two reasons. First, the termination clause requires "written notice," whereas the March 19 communication was oral. If FCIA chooses to invoke such clauses, it must abide by their explicit terms. *See Graves* v. *Iowa Mut. Ins. Co.*, 132 So.2d 393, 395 (Fla. 1961). Second, Florida adheres to the generally accepted rule that notice to the insured's broker does not terminate coverage unless the broker procures a substitute policy of like amount. *See generally Cat 'N Fiddle, Inc.* v. *Century Ins. Co.*, 213 So.2d 701, 704 (Fla. 1968); 45 C.J.S. § 450(2) (1946).[21] This rule

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from the United States . . . such shipment to begin when the products are placed en route to the buyer . . . ." An accompanying FCIA publication explains that coverage begins "when the goods leave the factory." On the other hand, FCIA and the district court take the position that shipment occurred on April 30, when the goods left the United States. Florida law requires that courts construe insurance policies so as to provide the broadest possible coverage to the insured. *See, e.g. Hulse* v. *Blue Cross/Blue Shield of Florida, Inc.*, 424 So.2d 191, 192 (Fla. Dist. Ct. App. 1983); *Davis* v. *Crown Life Ins. Co.*, 696 F.2d 1343, 1345 (11th Cir. 1983). Adopting Nu-Air's construction of the term "shipment," we note that 8 of the 12 containers left Tampa by April 14. Even if effective notice were received on March 19, it would not take effect for 30 days and therefore would only terminate coverage on the 4 remaining containers.

20. "Where a policy provides for written notice of cancellation, but does not specify the method of giving the written notice, and the notice is given by mail, the effective date of cancellation generally is to be determined based on the date of receipt of the notice by the insured." *Aetna Ins. Co.* v. *Settembrino*, 324 So.2d 113, 114 (Fla. Dist. Ct. App. 1975). In fact, Nu-Air would be completely covered even if the effective date of termination is calculated from the date FCIA mailed this notice of withdrawal, April 2.

21. Florida recognizes an exception to this rule where the agency relationship "was essentially unlimited, that for all intents and purposes [the broker] was the alter ego of the [the insured] in handling the latter's insurance matters,

takes root from an important policy. Notice must clearly convey to the insured the fact of termination so that he may obtain other insurance and avoid being subjected to risk without coverage. *See Cat 'N Fiddle, Inc.*, 213 So.2d at 704; *Graves*, 132 So.2d at 394-95. As the facts of the present case well demonstrate, notice to a broker is a most precarious means of securing this goal.

Finally, the lower court concluded that Nu-Air lost its ability to recover under the policy because Nu-Air failed to provide timely notice of loss and delayed paying premiums. This was also error. The only reason FCIA ever articulated in rejecting Nu-Air's claim was an unconditional denial that the coverage had ever been in force. Where an insurer unconditionally denies liability, it waives all policy provisions governing notification of loss, proof of loss, and payment of premiums:

> [A]s a matter of law, the effect of the thus-found-to-be-improper repudiation of coverage was to waive any right to insist upon the insureds' necessarily-thus-futile compliance with the various conditions to recovery—including notice . . . .

Wegener v. *International Bankers Insurance Co.*, 494 So.2d 259 (Fla. Dist. Ct. App. 1986), *review denied*, 504 So.2d 767 (Fla. 1987); *see, e.g., Hartford Accident & Indem. Co.* v. *Phelps*, 294 So.2d 362, 365 (Fla. Dist. Ct. App. 1974); *American Ins. Co. of Newark, N.J.* v. *Burson*, 213 F.2d 487, 490 (5th Cir. 1954). The lower court's conclusion was erroneous for the additional reason that FCIA accepted the delinquent premiums. An insurer cannot retain past-due premiums and at the same time claim that a forfeiture of the policy has occurred. *Travelers Indem. Co.* v. *Dana*, 434 So.2d 48 (Fla. Dist. Ct. App. 1983); *Mixson* v. Allstate Ins. Co., 388 So.2d 608, 609 (Fla. Dist. Ct. App. 1980), *review denied*, 397 So.2d 777 (1981); *Meeks* v. *State Farm Mut. Auto. Ins. Co.*, 460 F.2d 776, 778 n.3 (5th Cir. 1972).

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including the exercise of discretion encompassing an increased risk of loss to [the insured]." *Cat 'N Fiddle Inc.* v. *Century Ins. Co.*, 213 So.2d at 707.

FCIA suggests that it stands above these general principles of waiver and estoppel because it issues insurance on behalf of a United States government agency, the Export-Import Bank of the United States (hereinafter "Eximbank"). Specifically, FCIA argues that a failure to strictly comply with policy provisions bars recovery whenever the insurer acts as an agent of the United States government.[22] This bold supposition apparently derives from a leading Supreme Court case, *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947).[23] A brief summary of that opinion, however, demonstrates that FCIA's reading is too broad.

In *Federal Crop Insurance Corp.* v. *Merrill*, a farmer had insured reseeded wheat contrary to Federal Crop Insurance Corporation regulations. *Id.*, at 382, 68 S.Ct. at 2. Though the farmer had no knowledge of the regulations and was in fact misled by the government agent, the Supreme Court refused to apply notions of waiver and estoppel. *Id.* Instead, the Court reasoned that Congress had expressly delegated its rule-making

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22. Congress created Eximbank to provide, among other things, export insurance to American exporters. We assume *arguendo* that FCIA acted as Eximbank's agent with respect to the disputed coverage. In fact, this matter is not free from doubt. According to the policy, Eximbank insures "political risks and no other." FCIA insures "commercial risks," which include "failure of the buyer to pay to the Insured within six months after *due date* of payment, the amount due for products delivered to and accepted by the buyer." Even though Eximbank reinsures commercial risk, this may not be enough to establish an agency relationship. The reinsurance agreements only run between Eximbank and FCIA.

23. FCIA also cites district court cases. All involve governmental defendants and ultimately rely—directly or indirectly—upon *Federal Crop Insurance Corp.* v. *Merrill*. *See, e.g., Victoria Camera, Inc.* v. *Giuffrida*, 566 F. Supp. 796, 798 (S.D.N.Y. 1983); *Pavone, Inc.* v. *Secretary of H.U.D.*, 547 F. Supp. 230, 232 (D.Conn. 1982); *Klein* v. *Pierce*, 554 F. Supp. 18, 20 (S.D.N.Y. 1982); *Cross Queen, Inc.* v. *Director, Fed. Emergency Management Agency*, 516 F. Supp. 806, 809 (D.V.I. 1980). While some lower courts have extracted a broad principle from the original Supreme Court opinion, we do not find these decisions persuasive.

power to the administrative agency, and as a result, the administrative regulations limited the government's liability in the same way as legislation enacted directly by Congress:

> [This result] merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury. The "terms and conditions" defined by the Corporation, under authority of Congress, for creating liability on the part of the Government preclude recovery for the loss of the reseeded wheat no matter with what good reason the respondents thought they had obtained insurance from the Government.

Id., at 385, 68 S.Ct. at 3.

The entire logic of *Federal Crop Insurance Corp.* v. *Merrill*, boils down to the proposition that a plaintiff who contracts with a governmental defendant "[assumes] the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Id.* at 384, 68 S.Ct. at 3. We find nothing in the Supreme Court's reasoning that bears any application to private contractual arrangements between private litigants.

The present case is further distinguished from *Federal Crop Insurance Corp.* v. *Merrill* because, under the specific terms of the policy, FCIA remains the sole insurer. Though FCIA may recoup its losses under a separate agreement between FCIA and Eximbank, Nu-Air is not a party to that arrangement. Therefore, unlike the farmer in *Federal Crop Insurance Corp.* v. *Merrill*, Nu-Air's claim is not directed toward the public treasury:

> [Rather], it is FCIA's potential claim against the government under the reinsurance agreements, and not [the insured's], which is directed toward the public fisc; this is not the case before us.

Lovell Mfg. v. *Export-Import Bank of United States*, 777 F.2d 894, 901 (3d Cir. 1985). We conclude that traditional equitable principles of waiver and estoppel apply. *Id.*[24] [25]

III. The Misrepresentation Claim against FCIA

FCIA also relies upon its relationship with Eximbank to assert "official immunity" from Nu-Air's misrepresentation claim. We conclude that the lower court erred in granting this immunity.

The official immunity doctrine, largely judge-made, is not a rigid rule of decisionmaking. Rather, the Supreme Court has advised "a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens." *Doe* v. *McMillan*, 412 U.S. 306, 320, 93 S.Ct. 2018, 2028, 36 L.Ed.2d 912 (1973). Courts extend official immunity where the threat of liability "might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." *Barr* v. *Matteo*, 360 U.S. 564, 571, 79 S.Ct. 1335, 1339, 3 L.Ed.2d 1434 (1959).[26] Not surprisingly, this concern arises most frequently when the defendant is an individual in public service. *See, e.g.*, *Doe* v. *McMillan*, 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912 (U.S. Public Printer and Superintendent of Documents); *Barr* v. *Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (Director

24. We leave open the question of the extent to which federal law governs insurance contracts issued on behalf of Eximbank.

25. The district court held that Nu-Air failed to mitigate damages when Nu-Air pressed forward with the Nigerian transaction after discovering the FCIA had repudiated coverage. Though the district court assumed that Nu-Air could renegotiate the Nigerian contract, the defendants present no evidence that such was the case. Whether or not Nu-Air acted reasonably to limit its losses is a question of fact for the jury.

26. There are other less frequently articulated reasons for affording official immunity; the deterrent effect of liability on those who might enter public service; the drain of litigation on government time and resources; the inequity of liability for the acts of subordinates; the notion that public servants owe a duty to the public, not the individual; and the notion that civil suits are an inappropriate method of enforcing official accountability. *Gray* v. *Bell*, 712 F.2d 490, 496-97 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). These additional justifications most certainly do not apply where the defendant is a private insurance company.

of Rent Stabilization Office); *Claus* v. *Gyorkey*, 674 F.2d 427 (5th Cir. 1982) (VA Hospital Chief of Lab Services); *Evans* v. *Wright*, 582 F.2d 20 (5th Cir. 1978) (H.E.W. employees).

The justifications for immunity will seldom be present, however, when the defendant's connection with government is limited to a business relationship. Once shielded from tort liability, there is always the danger that a private enterprise will become too fearless, too vigorous and too effective. Thus, courts have only extended official immunity to the private sector on those rare occasions when the need is pressing. Two cases upon which FCIA relies prove the point. Both are defamation actions resulting from reports prepared by private industry for government agencies. *See Bushman v. Seiler*, 755 F.2d 653 (8th Cir. 1985) (consultant to insurance carrier investigating medicare fraud); *Becker v. Philco Corp.*, 372 F.2d 771 (4th Cir.), *cert. denied*, 389 U.S. 979, 88 S.Ct. 408, 19 L.Ed.2d 473 (1967) (defense contractor preparing security reports on employees). Clearly, exposing informants to this kind of liability frustrates paramount government objectives such as uncovering fraud in government programs and protecting national security. Immunity under these circumstances serves an obvious governmental purpose:

> Applying immunity here is consistent with protecting "officials who are required to exercise their discretion", and promoting the "public interest in encouraging the vigorous exercise of official authority."

Bushman, 755 F.2d at 656 (quoting *Butz* v. *Economou*, 438 U.S. 478, 506, 98 S.Ct. 2894, 2911, 57 L.Ed.2d 895 (1978)).[27] In contrast, FCIA does not identify how immunizing misrepresentations to its customers serves an equivalent purpose or, for that matter, any worthwhile purpose.

The remaining cases advanced by FCIA do not deal with official immunity at all, but center upon an altogether different

27. In fact, the common law arrives at this same result by affording such defendants a "qualified privilege." *See generally* W. Prosser, *The Law of Torts*, § 115 (4th ed. 1971); *see, e.g., Bradley* v. *Computer Sciences Corp.*, 643 F.2d 1029, 1032 (4th Cir.), *cert. denied*, 454 U.S. 940, 102 S.Ct. 476, 70 L.Ed.2d 248 (1981).

concept—sovereign immunity. In *Matranga* v. *Travelers Ins. Co.*, 563 F.2d 677 (5th Cir. 1977) and *Peterson* v. *Weinberger*, 508 F.2d 45 (5th Cir.), *cert. denied*, 423 U.S. 830, 96 S.Ct. 50, 46 L.Ed.2d 47 (1975), we dealt with actions against insurance companies for improperly withholding payments due on medicare claims. These insurance carriers were medicare fiscal intermediaries; the United States government provided the funds. In addition, Department of Health, Education and Welfare regulations explicitly state that "[t]he Secretary . . . is the real party in interest in the administration of the program." 20 C.F.R. § 405.670 (1973). As a result, we concluded that these suits were barred because they were actually directed against the United States government. *See Matranga*, 563 F.2d at 677-78; *Peterson*, 508 F.2d at 51-52. Wholly different considerations operate in the present case because Eximbank and the United States are not financially at risk.

Finally, we cannot ignore the language in the legislation creating Eximbank: "[T]he bank is authorized and empowered . . . to sue and be sued, to complain and to defend in any court of competent jurisdiction." 12 U.S.C. § 635(a). Immunity is not favored when a government agency enters the commercial sphere:

> [W]hen Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense . . . . [I]t must be presumed that when Congress launched a government agency into the commercial world and endowed it with authority to "sue or be sued," that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.

Franchise Tax Bd. of California v. *United States Postal Serv.*, 467 U.S. 512, 104 S.Ct. 2549, 81 L.Ed.2d 446 (1984) (quoting *FHA* v. *Burr*, 309 U.S. 242, 245, 60 S.Ct. 488, 490, 84 L.Ed. 724 (1940)); *see also Brady* v. *Roosevelt Steamship Co.*, 317 U.S. 575, 581, 63 S.Ct. 425, 428, 87 L.Ed. 471 (1943); *Rochester Methodist Hosp.* v. *Travelers Ins. Co.*, 728 F.2d 1006, 1012-16 (8th Cir. 1984). Since there is no reason to think that Eximbank would be immune from suit, *see, e.g., Enterprise Tools, Inc.* v. *Export-Import Bank of the U.S.*, 564 F. Supp. 761, 763 (E.D. Ark. 1983), FCIA cannot derive immunity as Eximbank's agent. Accordingly, we hold that Nu-Air should have the opportunity to present its tort claim against FCIA to a jury.[28]

IV. Nu-Air's Claims Against Intercredit

The district court rejected Nu-Air's entire cause of action against Intercredit. We conclude that the district court reached this surprising result by misapplying the law to key issues, which were actually questions of fact for the jury. In order to more fully explain our holding, we must briefly set forth the relevant law governing the relationship between Intercredit and Nu-Air.

When a broker agrees to obtain insurance for a client, the broker becomes the client's agent. *See, e.g., Bennett* v. *Berk*, 400 So.2d 484, 485 (Fla. Dist. Ct. App. 1981); *First Nat'l Ins. Agency* v. *Leesburg Transfer & Storage, Inc.*, 139 So.2d 476, 479 (Fla. Dist. Ct. App. 1962). As agent, the broker owes his client a duty of care and a duty to exercise the skill he holds himself out as having. Restatement (Second) of Agency § 379 and comment c (1957); *see, e.g., Klonis ex rel. Consolidated Am. Ins. Co.* v. *Armstrong*, 436 So.2d 213, 217 (Fla. Dist. Ct. App. 1983),

28. Although the lower court came to a contrary conclusion, the record does not sufficiently show for purposes of summary judgment that Nu-Air unjustifiably relied on the alleged misrepresentations or negligently failed to ascertain the facts. *See McCurley* v. *Auto-Owners Ins. Co.*, 356 So.2d 68, 69 (Fla. Dist. Ct. App. 1978). Whether FCIA and Intercredit negligently made false statements to Nu-Air and whether Nu-Air reasonably relied on the misrepresentations to its detriment are questions for a jury to determine. *Horn* v. *First Orlando Realty Management Corp.*, 483 So.2d 80 (Fla. Dist. Ct. App. 1986).

review denied, 449 So.2d 264 (1984); *Sheridan* v. *Greenberg*, 391 So.2d 234, 236 (Fla. Dist. Ct. app. 1980); *Butler* v. *Scott*, 417 F.2d 471, 473 (10th Cir. 1969). A breach of these duties may subject the broker to liability in both contract and tort. *Monogram Products, Inc.* v. *Berkowitz*, 392 So.2d 1353, 1355 (Fla. Dist. Ct. App. 1980); *First Nat'l Ins. Agency* v. *Leesburg Transfer & Storage, Inc.*, 139 So.2d 476, 479 (Fla. Dist. Ct. App. 1962); Restatement (Second) of Agency § 401 comment a (1957). In addition, if a broker falsely represents that a policy has been approved, he may become liable for negligent misrepresentation. *See, e.g., Meltsner* v. *Aetna Casualty & Ins. Co.*, 177 So.2d 43 (Fla. Dist. Ct. App. 1965), *cert. denied*, 184 So.2d 886 (1966).

Intercredit successfully argued before the district court that it had discharged its duties as broker when FCIA agreed to insure Nu-Air under the master policy. We disagree. As a professional, a broker "is charged with the ability to do more than simply fill out application forms." *Bell* v. *O'Leary*, 744 F.2d 1370, 1373 (8th Cir. 1984). A broker must take all reasonable steps necessary to ensure that insurance is in place. *See Sheridan* v. *Greenberg*, 391 So.2d at 236; *Haeuber* v. *Can-Do, Inc. II.*, 666 F.2d 275, 280 (5th Cir. Unit A 1982). Regardless of whether the jury believes Michelle Milone or Jane Ferry, there is sufficient evidence to support a finding that Intercredit breached its duty to Nu-Air.

If Michele Milone is testifying truthfully, Intercredit incorrectly informed Nu-Air that SBCL coverage was in place. A jury could find that this misrepresentation and Intercredit's subsequent failure to correct its initial error amounted to a negligent breach of Intercredit's duty to Nu-Air. A jury could also hold Intercredit liable for the tort of negligent misrepresentation.

While it is true that Jane Ferry denied that there was a misrepresentation, the jury could nevertheless find a breach of duty even if it accepts her testimony as truthful. Most of the communications between Nu-Air and FCIA passed through Intercredit as intermediary, yet, Intercredit remained blissfully unaware of the

impending crisis. A broker must possess a reasonable knowledge of its business and a reasonable familiarity with the paperwork. *See Seascape of Hickory Point Condominium Ass'n* v. *Associated Ins. Services,* 443 So.2d 488 (Fla. Dist. Ct. App. 1984). In fact, Jane Ferry testified that she did not notice the disparity between the requested coverage and the $200,000 limit recited by the relevant documents until the time of her deposition. A jury could find that Intercredit breached its duty to Nu-Air when the broker failed to detect the problems with its client's insurance coverage at an earlier date.

Intercredit must also account for its failure to inform Nu-Air that FCIA had withdrawn Nu-Air's SBCL application.[29] Three weeks elapsed between the time FCIA informed Intercredit and the date when Nu-Air finally received notice from FCIA. An agent is subject to the duty to keep his principal informed. This duty exists when the agent learns facts the principal would desire to know. *See* Restatement (Second) of Agency § 381 and comment a (1957). Accordingly, a broker, who is not to blame for the failure to obtain coverage, may become liable for damages if he fails to inform his principal that the requested insurance has not been procured. *DeMarlor* v. *Foley Carter Ins. Co.,* 386 So.2d 22, 23 (Fla. Dist. Ct. App. 1980); *Cat 'N Fiddle, Inc.* v. *Century Ins. Co.,* 200 So.2d 208, 211 (Fla. Dist. Ct. App. 1967), *vacated on other grounds,* 213 So.2d 701 (Fla. 1968). When a broker learns his client's insurance has been cancelled, this same duty requires the broker to notify the insured within a reasonable period of time. *Johnson* v. *Aetna Casualty & Surety Co.,* 448 So.2d 1056, 1058 (Fla. Dist. Ct. App.), *review denied,* 458 So.2d 273 (Fla. 1984); *Cat 'N Fiddle* v. *Century Ins. Co.,* 200 So.2d at 211. A jury could find that Intercredit breached this duty to Nu-Air when the broker failed to warn its client that FCIA would not supply the requested insurance.[30]

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29. It is undisputed that Intercredit never communicated this fact to Nu-Air.

30. Intercredit is therefore wrong to suggest that it could not be liable if FCIA properly availed itself of policy provisions which gave FCIA the right to withdraw coverage.

Nevertheless, the district court reasoned that any negligence on the part of Intercredit was unimportant because it was unreasonable for Nu-Air to believe its broker.[31] The district court advanced two reasons why Nu-Air unjustifiably relied upon Intercredit's representations that coverage was in place. First, the master policy gave FCIA the right to withdraw coverage at the insurer's discretion. Second, Nu-Air executed a document which specified a $200,000 aggregate limit and made no provision for SBCL coverage.

The thrust of the district court's argument appears to be that a broker cannot be held accountable for its misrepresentations so long as the customer has been exposed to the same technical policy information as the broker.[32] Such reasoning misperceives the fundamental nature of the broker-client relationship. This relationship arises from "trust and confidence consensually placed in the superior knowledge, skill and judgment of [the broker]." *Butler* v. *Scott*, 417 F.2d 471, 473 (10th Cir. 1969) (citation omitted). While there is a point at which this trust becomes unreasonable, this determination should not be made on a motion for summary judgment. *See, e.g., McCurley* v. *Auto-*

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31. Ruling that Nu-Air's reliance was unjustified allowed the court to further rule that Nu-Air acted unreasonably in not taking more appropriate measures to protect itself. These two rulings, if allowed to stand, would severely compromise Nu-Air's cause of action. Under Florida law, an insured's failure to mitigate damages may operate as a waiver and estoppel against the right to assert claims arising from the broker-client relationship. *Keller Indus.* v. *Bellefonte Ins. Co.*, 412 So.2d 899 (Fla. Dist. Ct. App. 1982) (quoting *Burns* v. *Consolidated Am. Ins. Co.*, 359 So.2d 1203, 1206 (Fla. Dist. Ct. App. 1978)). Nu-Air's negligent misrepresentation claim would also fail because justifiable reliance is a key element of that tort. *See, e.g., Bruce* v. *American Dev. Corp.*, 408 So.2d 857 (Fla. Dist. Ct. App. 1982).

The lower court advances an additional reason why Nu-Air acted unreasonably. Apparently, the lower court concluded that Nu-Air should have purchased pre-shipment insurance to protect itself against the risk that FCIA would wrongly repudiate the post-shipment insurance before the goods were actually shipped. This is error. Nu-Air had the right to assume that its insurer would act in good faith.

32. The parties dispute how much of this technical information Intercredit passed on to Nu-Air.

Owners Ins. Co., 356 So.2d 68 (Fla. Dist. Ct. App. 1978).[33] Thus, we remand Nu-Air's tort and contract claims against Intercredit for trial before a jury.

REVERSED and REMANDED.

33. *See supra* note 28.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NU-AIR MANUFACTURING COMPANY,
A Florida Corporation,
Plaintiff-Appellant,

v.

FRANK B. HALL & CO. OF NEW YORK, A Corporation incorporated under the laws of the State of New York, doing business as Intercredit Agency, AETNA CASUALTY AND SURETY COMPANY, INC., *ET AL.*,
Defendants-Appellees.

No. 86-3359

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion July 24, 1987, 11 Cir., 198 , F.2d).

(August 31, 1987)

Before: TJOFLAT and VANCE, Circuit Judges, and ATKINS[1], Senior District Judge

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

.....
United States Circuit Judge

1. Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-3359

D.C. Docket No. 84-109-17

NU-AIR MANUFACTURING COMPANY,
A Florida Corporation,
Plaintiff-Appellant,

versus

FRANK B. HALL & CO. OF NEW YORK, A Corporation incorporated under the laws of the State of New York, doing business as Intercredit Agency, AETNA CASUALTY AND SURETY COMPANY, INC., *ET AL.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before TJOFLAT and VANCE, Circuit Judges, and ATKINS[1], Senior District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED; and that this cause be and the same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

1. Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs of appeal to be taxed by the Clerk of this Court.

Entered: July 24, 1987
For the Court: Miguel J. Cortez, Clerk

By: .....
Deputy Clerk

ISSUED AS MANDATE: Oct. 15, 1987

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

NU-AIR MANUFACTURING COMPANY,
Plaintiff(s),

vs.

FRANK B. HALL & COMPANY OF NEW YORK, et al.,
Defendant(s).

CASE NO. 84-109-CIV-T-17

MEMORANDUM OPINION

This cause is before the Court on Defendant's, Frank B. Hall & Company of New York, hereinafter Frank B. Hall, motion to strike attorney's fees from Count's III, IV, and V, filed with this Court April 17, 1984; Defendants', Foreign Credit Insurance Association and its member companies, collectively FCIA, motion for summary judgment, filed with this Court January 29, 1985; and Defendant's, Frank B. Hall & Company of New York, d/b/a Intercredit Agency, motion for summary judgment filed with this Court March 4, 1985.

JURISDICTION

The basis of federal jurisdiction is 28 U.S.C. § 1332. Plaintiff, Nu-Air Manufacturing Company (Nu-Air), a Florida corporation, is suing Defendants Frank B. Hall & Company of New York, d/b/a/ Intercredit Agency (Intercredit), New York Corporation, and the Foreign Credit Insurance Company (FCIA), an unincorporated association of insurance companies which is headquartered in New York.

SUMMARY JUDGMENT STANDARD

This circuit clearly holds that summary judgment should only be entered when the moving party has sustained its burden of

showing the absence of a genuine issue as to any material fact when all the evidence is viewed in the light most favorable to the nonmoving party. *Sweat* v. *The Miller Brewing Co.* 708 F.2d 655 (11th Cir. 1983). All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party, not assessing the probative value of any evidence. *Hayden* v. *First National Bank of Mt. Pleasant*, 595 F.2d 994, 996-97 (5th Cir. 1979), quoting *Gross* v. *Southern Railroad Co.*, 414 F.2d 292 (5th Cir. 1969).

STATEMENT OF THE CASE

This action concerns an export credit insurance policy issued to Plaintiff Nu-Air by Defendant Foreign Credit Insurance Association (FCIA). Defendant Intercredit acted as broker in connection with the policy, including the application for the policy. Nu-Air's claims [sic] that Intercredit advised Nu-Air that FCIA had agreed not only to issue to Nu-Air the export credit insurance policy, but also that FCIA had agreed to provide Nu-Air, through an endorsement to the policy commonly known as a Special Buyer Credit Limit ("SBCL"), with specific coverage against the risk that Nu-Air's Nigerian customer, Dukans, would not make payment in connection with Nu-Air's proposed shipment of aluminum windows and doors to Dukans in Nigeria.

Nu-Air claims that as a result of this representation from Intercredit, FCIA is liable to Nu-Air as a matter of contract law when Dukans, in fact, failed to make full payment to Nu-Air for the shipment of windows and doors. FCIA disputes that it ever represented to Intercredit that it would approve the Special Buyer Credit Limit. Intercredit insists that FCIA made this representation. Defendants FCIA and Intercredit, in response to Nu-Air's claims, also have asserted various affirmative defenses.

Nu-Air alternatively claims that, even assuming FCIA is not liable to Nu-Air as a matter of contract law because FCIA, in fact, never advised Intercredit that it would approve the SBCL, FCIA still is liable to Nu-Air because Intercredit was acting as FCIA's agent when it represented to Nu-Air that FCIA would

issue the SBCL, because Intercredit's representations were negligent, and because Plaintiff relied on these negligent misrepresentations to its detriment by manufacturing the windows and doors and ultimately shipping them to Dukans.

Nu-Air also claims that Intercredit is liable to Nu-Air because Intercredit breached its contract with Nu-Air by which Intercredit agreed to secure export credit insurance coverage for Nu-Air's proposed transaction with Dukans. Alternatively, Nu-Air claims that Intercredit is liable to Nu-Air because Intercredit negligently failed to maintain export credit insurance for Nu-Air transaction [sic]. Finally, Nu-Air also claims that Intercredit is liable to Nu-Air because Intercredit negligently misrepresented to Nu-Air that FCIA would provide coverage for Nu-Air's transaction with Dukans and that Nu-Air relied on this representation to its detriment.

As cross-claimant, FCIA seeks indemnification from Intercredit based on the principle that FCIA is liable at all [sic], is only vicariously liable to Nu-Air because of the negligent representation of its purported agent, Intercredit. Alternatively, FCIA seeks contribution from Intercredit based on the principle that if FCIA is liable to Nu-Air, Intercredit must contribute to Nu-Air's recovery because its actions also contributed to Nu-Air's injuries.

STATEMENT OF THE FACTS

Plaintiff, a Florida Window and door manufacturer, in early 1982, submitted applications to Frank B. Hall, d/b/a Intercredit Agency (Intercredit), an insurance agency representing Foreign Credit Insurance Association (FCIA) a group of insurers who issue export credit insurance for a master credit insurance policy and a special buyer's credit limit (SBCL). The SBCL was a request to insure against nonpayment, one-half of a specific proposed order for $740,000 of windows and doors from a Nigerian company (Dukans).

In January and February of 1982, Frank B. Hall d/b/a Intercredit Agency (hereinafter known as "Intercredit"), acting on

the request of Nu-Air through its Treasurer, John J. Healey, applied for a Master Export Credit Insurance Policy on behalf of Nu-Air through FCIA and also requested an SBCL for Dukans in the amount of $371,530.49. FCIA insurance protects an exporter against various defined commercial and political risks that the foreign insurer will not make payment for goods shipped as a part of an FCIA eligible transaction. For an additional premium payment, FCIA also makes available to certain insureds, pre-shipment coverage which protects the insured against various pre-shipment risks, including the risk that FCIA will withdraw coverage for a specific shipment before shipment has been made. Absent a pre-shipment endorsement to a standard FCIA policy, only losses occurring after shipment are covered under the standard FCIA policy.

In February, 1982, Intercredit forwarded the applications to FCIA and on March 3, 1982, Jane Ferry, Senior Vice President of Intercredit, while acting within the scope of her authority and as agent for FCIA, allegedly advised Plaintiff that FCIA had approved the issuance of a master export credit insurance policy and the Dukans SBCL. Ferry claims that she was advised by Michele Milone, FCIA Sales Assistant, that Nu-Air's application for the Master Export Credit Insurance Policy and the SBCL for Dukans in the amount of $371,530.49 were approved. Ferry (Intercredit) notified Healey (Nu-Air) of such approval. Intercredit, on March 3, 1982, allegedly quoted a rate for the policy, with aggregate limit of $200,000, which Plaintiff accepted and subsequently paid. Moreover, no terms or conditions of the SBCL were provided.

Plaintiff alleges that after securing the Dukans SBCL, Plaintiff advised Dukans that it could now accept their order and immediately began the assembly of the doors and windows, which consisted of twelve (12) shipping containers.

On April 12, 1982, Plaintiff received a letter from FCIA stating that the Dukans SBCL was not approved and was considered withdrawn because of the Nigerian Government's ban on imports. FCIA would not reconsider approval. At this time,

Plantiff [sic] had already fabricated most of the order and had transported 8 of the 12 shipping containers from its factory in Tampa to Jacksonville, Florida for ocean shipment to Nigeria scheduled to occur on April 30, 1982. Despite Nu-Air's knowledge that no coverage was in effect, and despite advice allegedly from Intercredit not to ship without coverage, Nu-Air shipped its products to Dukans in Nigeria.

When notified of the FCIA action, Plaintiff advised Intercredit that it had no choice except to ship the entire order because the windows and doors could not be resold or otherwise disposed of without sustaining an enormous loss.

Plaintiff then shipped the entire order which was received by Dukans in July, 1982. Plaintiff made repeated demands for payment of the remaining balance of approximately $311,846. However, Dukans refused to pay.

Plaintiff, on April 11, 1983, filed a proof of claim with FCIA for the insured loss. FCIA, on May 18, 1983, rejected Plaintiff's claim, stating that Plaintiff's SBCL was declined prior to shipment and that no coverage existed under NU-Air's [sic] discretionary credit limit.

This action was filed on January 24, 1984, against Defendants seeking the recovery of $280,661.68, representing 90% of the unpaid account balance, plus interest, attorney's fees and costs.

DISCUSSION

Nu-Air had considerable prior experience in business dealings with Intercredit and FCIA. There are only two facts in dispute in this case, neither or which, however, can be material in light of the remaining facts which have been conceded and the well-established principles of law which must be applied to the undisputed facts. With regard to the narrow issue of whether FCIA approved Nu-Air's application for a Special Buyer Credit Limit, or so advised Intercredit, FCIA never approved Nu-Air's application for a Special Buyer Credit Limit to cover the Dukans transaction. The factual dispute as to whether FCIA ever advised Intercredit, or anyone else, that it had approved Nu-Air's SBCL

application, is immaterial since FCIA and Nu-Air never entered into an enforceable insurance contract regarding the SBCL.

However, it is significant that even if the trier of fact accepts Intercredit's assertion that FCIA advised Intercredit that FCIA had approved Nu-Air's SBCL, it is undisputed that, prior to Nu-Air's shipment of the goods from the United States on or about April 30, 1982, FCIA notified Intercredit, on March 19, 1982, and Nu-Air, that it was withdrawing the SBCL application, as permitted by the policy's terms. Even if this oral notice of withdrawal is disputed, the admitted facts demonstrate that Plaintiff received written notification April 12, 1982. The policy FCIA issued to Nu-Air provided Nu-Air with the option to protect itself against various pre-shipment risks, including pre-shipment withdrawal by FCIA. Although Nu-Air's broker, Intercredit, was aware that FCIA could, in fact, withdraw coverage, Nu-Air consciously chose not to select FCIA pre-shipment coverage.

Even if the trier of fact finds that FCIA, on March 3, 1982, advised Intercredit that FCIA had approved Nu-Air's SBCL, FCIA exercised its right to withdraw coverage without liability. If only the written withdrawal notification of April 12th is effective, and not the alleged oral withdrawal notification of March 19th, then the lack of written notification of SBCL coverage precludes there ever being such coverage. Finally, even if FCIA did not withdraw the SECL before Nu-Air's rights vested under the policy, Nu-Air still is barred from recovering under the policy because it is undisputed that Nu-Air failed to file with FCIA, in a timely fashion, various reports required by the policy, including notice of Dukans' default and Nu-Air's Proof of Loss Form. Plaintiff's filed claim February, 1985 [sic], five months later wherein the insurance policy presented a 90 day limit. Plaintiff's "proof of loss" states the shipping date as April 30th. Furthermore, Plaintiff paid the premium May 15th, wherein the policy requires payment within fifteen days of the shipment. If shipment were to be construed as before April 30th, then Nu-Air

clearly defaulted as to payment of premium. The insured's failure to comply with its obligation to file timely notices and proof of loss, bar the insured from recovery under the policy.

With regard to Nu-Air's negligence count, Intercredit never acted as FCIA's agent in connection with the Nu-Air transaction. Nu-Air designated Intercredit to act on Nu-Air's behalf as Nu-Air's broker; all parties considered Nu-Air to be Intercredit's client; Nu-Air authorized Intercredit to act on its behalf; and Intercredit had no authority to issue an FCIA policy, any endorsements to an FCIA policy, or approve an SBCL application. Thus, under well-established agency law, Intercredit was Nu-Air's agent and FCIA cannot be vicariously liable for Intercredit's acts.

Moreover, because it also is undisputed that FCIA acted at all times as an agent of the Export-Import Bank of the United States, an agency of the United States Government, FCIA, thus, is immune from Nu-Air's negligent misrepresentation claim by the doctrine of official immunity, which prohibits suits against government agents, including those in the private sector, for non-constitutional torts.

FCIA also cannot be held liable on Nu-Air's misrepresentation claim because Nu-Air's reliance, if any, on Intercredit's representation was, as a matter of law, unreasonable. Both Nu-Air and Intercredit were aware that the insurers' total liability under the policy issued to Nu-Air could not exceed $200,000; thus, neither Nu-Air nor its agent, Intercredit, acted reasonably, as a matter of law, when they both allegedly believed that FCIA had approved Nu-Air's request for the separate $371,530.49 SBCL. Furthermore, because Nu-Air, on its own or through its agent Intercredit, knew, or should have known, that it had the option to select pre-shipment coverage and knew, or should have known, that FCIA could withdraw coverage prior to Nu-Air's shipment of the goods from the United States without incurring any liability, Nu-Air did not rely reasonably on Intercredit's representations regarding FCIA approval of the Nu-Air SBCL. Nu-Air also cannot recover here because it failed to satisfy its common law and

contractual obligations to mitigate its damages when it proceeded with the sale to its Nigerian purchaser in the face of FCIA's clear and unequivocal declaration that it would not provide the requested coverage without making any effort to renegotiate with Dukans.

FINDINGS OF FACT

The statement of facts following is admitted by the parties in the pre-trial stipulation.

1. Plaintiff Nu-Air Manufacturing Co. ("Nu-Air") is a Florida corporation engaged in the business of assembling aluminum windows and doors. Its principal place of business is in Tampa, Florida.
2. Defendant Frank B. Hall & Co. ("Frank B. Hall") is a New York corporation engaged principally in the insurance brokerage business. Intercredit Agency ("Intercredit") is an unincorporated division of Frank B. Hall engaged in the brokerage of export credit insurance. Frank B. Hall and Intercredit each has its principal place of business in New York, N.Y. Intercredit brokers insurance policies issued by FCIA and by various other export credit insurance companies.
3. Defendant Foreign Credit Insurance Association ("FCIA") is an unincorporated association of insurance companies with its principal place of business in New York, N.Y.
4. The remaining defendants ("the Companies") are private insurance companies which are members of FCIA. None of the companies is incorporated in or has its principal place of business in Florida.
5. The Export-Import Bank of the United States ("Eximbank") is a United States government agency created by Act of Congress to provide, *inter alia*, export credit insurance to American exporters.
6. In 1961, with the express encouragement of Eximbank, FCIA was formed to act as Eximbank's agent in providing insurance protection against certain commercial and political risks to which United States exporters are exposed.

7. For over twenty years, pursuant to authority granted by 12 U.S.C. § 635(c)(2), Eximbank has entered into a series of agency agreements under which Eximbank continually has appointed and reappointed FCIA as Eximbank's agent in connection with the marketing, issuance, administration, and servicing of all export credit insurance policies issued by FCIA and Eximbank.

8. Under the agency agreement between FCIA and Eximbank, FCIA's authority in connection with the export credit insurance program is delegated to it by Eximbank and is subject to supervision and control of Eximbank officials.

9. Among other things, the agency agreement between Eximbank and FCIA specifically grants authority to FCIA to issue quotations and insurance policies on behalf of Eximbank; administer and service matters relating to such policies; collect all premiums for Eximbank for insurance issued by FCIA; and "take all other action which may be required under the circumstances in order to exercise the authority delegated to [FCIA]" under the agency agreement.

10. Under the FCIA-Eximbank agency agreement, Eximbank has authority over all significant decisions surrounding the issuance of export credit insurance. Eximbank also has the sole authority to determine the FCIA policy premium rates. Eximbank establishes premium rates at such levels that the insurance is widely available to United States exporters, both large and small.

11. In the fall of 1981, Nu-Air and Dukans Alliance International Co. ("Dukans") of Nigeria entered into negotiations for the sale by Nu-Air to Dukans of aluminum doors and windows.

12. On January 29, 1982, Nu-Air forwarded to Intercredit for submission to FCIA on Nu-Air's behalf an application for an FCIA export credit insurance policy requesting an aggregate limit of coverage under that policy of $50,000.

13. Nu-Air, on or about February 10, 1982, mailed to Intercredit for Intercredit to submit to FCIA on Nu-Air's behalf, a cover letter and an application for the issuance

of a Master Export Credit Insurance Policy and a Special Buyer Credit Limit, hereinafter referred to as "SBCL" in the amount of $65,000 for Dukans.

14. Nu-Air, on or about February 10, 1982, mailed another application to Intercredit for Intercredit to submit to FCIA on Nu-Air's behalf requesting FCIA's approval of a larger SBCL for Dukans insuring against the nonpayment by Dukans of the sum of $371,530.49, representing approximately one-half of the value of a proposed shipment of custom made aluminum windows and doors in the amount of $630,137.20 ordered by Dukans.

15. On or about February 17, 1982, Jane L. Ferry, Senior Vice President of Intercredit, processed Nu-Air's application for the SBCL for Dukans on Nu-Air's behalf in the amount of $371,530.49, and forwarded required reports, credit checks, and financial statements to FCIA, according to the letter.

16. On or about February 17, 1982, Intercredit submitted to FCIA, on behalf of Nu-Air, an application for an FCIA standard multibuyer export credit insurance policy (a "Master Policy").

17. On or about February 17, 1982, Intercredit submitted to FCIA on behalf of Nu-Air an application for an FCIA Special Buyer Credit Limit in the amount of $371,530.49 to cover that portion of the purchase price which Dukans allegedly would pay Nu-Air by sight draft.

18. An FCIA Special Buyer Credit Limit [SBCL] is an endorsement to an FCIA policy in which FCIA agrees, subject to certain terms and conditions, to insure a specific transaction otherwise outside the policy's coverage, either because the amount of the transaction exceeds the discretionary credit limit or the terms of the transaction are not otherwise permitted under the standard terms and conditions of the policy.

19. FCIA acted within the scope of the authority delegated to it by its agency agreement with Eximbank during the processing of Nu-Air's policy and SBCL applications.

20. John Healey is treasurer and comptroller of Nu-Air. He has been treasurer and comptroller of Nu-Air since 1979.

21. Healey had primary responsibility at Nu-Air for the procurement of FCIA export credit insurance.

22. Healey was the only person at Nu-Air who had contact with Intercredit regarding procurement of FCIA insurance coverage.

23. Prior to his employment with Nu-Air, Healey was treasurer of the Farrel Corporation in Ansonia, Connecticut.

24. As treasurer of Farrel, Healey participated in and became familiar with FCIA export credit insurance. In connection with his employment at Farrel, Healey had prior contact and involvement with Intercredit which had served as Farrel's broker in connection with Farrel's FCIA insurance policies.

25. In its application, Healey, on behalf of Nu-Air, designated Intercredit as Nu-Air's broker in connection with the procurement of FCIA export credit insurance.

26. Healey specifically requested that Intercredit act as Nu-Air's broker in connection with Nu-Air's application for an FCIA short-term Master Policy and an SBCL covering Nu-Air's proposed transaction with Dukans.

27. Nu-Air's understanding in March 1982 was that Intercredit had no authority to issue a policy quote on behalf of FCIA.

28. Nu-Air's understanding in March 1982 was that Intercredit had no authority to issue a policy on behalf of FCIA, or any endorsement thereto, including an SBCL.

29. In March and April, 1982, Intercredit's understanding was that it was representing Nu-Air in the procurement of export credit insurance from FCIA.

30. Intercredit never informed Nu-Air that Intercredit was in any way acting on behalf of FCIA.

31. Neither Healey nor anyone else at Nu-Air ever contacted FCIA directly regarding Nu-Air's acquisition of export credit insurance. All communications with FCIA by or on behalf of Nu-Air were made through its broker, Intercredit.

32. Nu-Air's application for an FCIA Master Policy was considered by FCIA's Marketing Department. Consideration by FCIA of an application for an FCIA Master Policy involves an evaluation by FCIA of the credit worthiness of the proposed Insured.

33. Nu-Air's application for an SBCL was considered by FCIA's Underwriting Department, which evaluates the creditworthiness of the proposed buyer.

34. FCIA's custom and practice in March 1982 was to consider a prospective customer's application for a Master Policy first, and then, if (1) FCIA issues a quotation to a prospective customer and (2) the prospective customer agrees to the terms and conditions of the quotation and submits the required premium check to FCIA, consider the customer's application for an SBCL, if any.

35. Jane Ferry was the employee at Intercredit primarily responsible for procuring FCIA export credit insurance for Nu-Air.

36. Ferry is Senior Vice President of Intercredit. She has been an employee of Intercredit for 25 years. For over 6 years, she has been responsible for procuring export credit insurance for Intercredit clients.

37. Ferry knew on March 3, 1982 that FCIA's Underwriting Department was responsible for approving all SBCL applications. Ferry also knew that FCIA's Marketing Department had no responsibility for the approval of SBCL applications.

38. Intercredit's custom and practice in March 1982 was to deal only with FCIA's Marketing Department regarding matters relating to the issuance of a Master Policy.

39. Intercredit's custom and practice in March 1982 was to deal only with FCIA's Underwriting Department regarding matters relating to the issuance of an SBCL.

40. Paul Garrigue is President of Intercredit and a member of the board of directors of Frank B. Hall. He has been with Intercredit since 1959.

41. Garrigue understood in March 1982 that FCIA's custom and practice was to consider a Master Policy application first and, upon issuance of the quotation and

acceptance by the customer, then to consider an SBCL application.

42. Both Nu-Air and Intercredit understood as of March 3, 1982 that an FCIA policy's aggregate limit was the total or maximum liability of the insurers thereunder. Nu-Air assumed as of that date that the aggregate limit under its proposed FCIA policy would be increased to an amount at least equal to the size of the SBCL Nu-Air was seeking.

43. Article V of the Policy provides as follows:

> "The Insurer shall not be liable for any loss;
>
> * * *
>
> J. Under Coverage A-Commercial Credit Risks . . . for which written claim is not made, on the Proof of Loss Form prescribed by the Insurer within eight months from the date of default."

44. FCIA's custom and practice in March 1982 was to inform the prospective insured's broker verbally of the material terms of a policy quotation, including, among other things, the discretionary credit limit, the aggregate limit of liability, the premium rate, and any special terms or conditions and, thereafter, to send to the prospective insured's broker a written quotation.

45. Intercredit has never had any authority to issue policy quotations on behalf of FCIA, approve policy applications for FCIA insurance, or approve applications for SBCL's under FCIA policies.

46. Michele Milone in March 1982 was a sales representative in FCIA's Marketing Department. She began her employment at FCIA in 1979.

47. Michele Milone was the sales representative at FCIA responsible for processing Nu-Air's application for a Master Policy. Ms. Milone had no authority to approve the issuance of a policy quotation. Ms. Milone also had no authority whatsoever with regard to the processing of an SBCL application.

48. On or about March 3, 1982, Milone notified Ferry by telephone that FCIA intended to issue to Nu-Air a quotation for an FCIA Master Policy.

49. In March 1982, Intercredit's custom and practice when it was advised by FCIA that FCIA would issue a quotation for an FCIA policy was to ask FCIA about any special terms and conditions which FICA intended to include in the quotation, including, among other things, aggregate limit of liability, discretionary credit limit and premium rate.

50. In their March 3, 1982 telephone conversation, Milone informed Ferry of the material terms that would be included in FCIA's quote for Nu-Air's proposed policy, including the premium rate, discretionary credit limit, and aggregate limit of liability.

51. In their March 3, 1982 telephone conversation, Ms. Milone advised Ms. Ferry that the quote FCIA would issue to Nu-Air would include the following terms:

    a. A $20,000 discretionary credit limit.

    b. A $200,000 aggregate credit limit.

    c. A premium rate of $1 per $100 of coverage.

52. In March 1982, FCIA's custom and practice was to have a representative of FCIA's Underwriting Department inform brokers or insureds of FCIA's final decision on an SBCL application.

53. On March 3, 1982, Intercredit advised Nu-Air that FCIA would issue a quotation for a Master Policy. Intercredit on March 3, 1982 also informed Nu-Air that its SBCL application under the Master Policy had been approved.

54. Nu-Air, upon receiving notification from Intercredit that the SBCL for Dukans had been approved by FCIA, on or about March 3, 1982, advised Dukans of FCIA's approval, and based on Nu-Air's understanding that FCIA had approved the SBCL, accepted the order for custom made aluminum windows and doors in the amount of $630,137.20 from Dukans; payable one-half by letter of credit, and the remaining one-half by sight draft.

55. Nu-Air immediately proceeded to assemble the aforedescribed order for Dukans and started shipping containers of finished windows and doors to the Port of Jacksonville, Florida, on March 16, 1982. Subsequent

containers of materials were shipped to Jacksonville on March 18, 1982, March 22, 1982, March 26, 1982 (2 containers), April 1, 1982, April 5, 1982, April 7, 1982, April 14, 1982 (2 containers), April 20, 1982 and April 26, 1982.

56. On March 3, 1982, Healey requested that Ferry ask FCIA to reconsider its quoted premium rate.

57. On or about March 3, 1982, Ferry, pursuant to instructions from Nu-Air, requested that FCIA reconsider its quotation regarding the premium rate set forth on the policy quote.

58. On March 3, 1982, Intercredit understood that FCIA had the right, under the terms of Nu-Air's Master Policy, to cancel an SBCL without any coverage responsibility prior to shipment of the merchandise unless the insured had selected pre-shipment coverage.

59. On March 3, 1982, Ferry understood that the aggregate policy limit was the total liability of the insurer.

60. On March 3, 1982, Ferry understood that, without an increase by FCIA in the aggregate limit of Nu-Air's Master Policy, Nu-Air's coverage under its policy would not exceed $200,000.

61. The amount of coverage which Nu-Air requested on its SBCL application exceeded the amount of the aggregate credit limit in Nu-Air's Master Policy.

62. FCIA refused Intercredit's request to lower the premium rate which it had quoted to Intercredit for Nu-Air's Master Policy.

63. On or about March 4, 1982, FCIA forwarded to Intercredit a written quote for Nu-Air's proposed Master Policy, which included an aggregate policy limit of $200,000.

64. In March 1982, Healey understood that FCIA's custom and practice was to issue written documentation evidencing approval of an insurance application and an SBCL application.

65. Neither Nu-Air nor Intercredit ever applied to FCIA for an increase in the Nu-Air policy aggregate limit. FCIA never approved an increase in the aggregate limit set forth in the Nu-Air Master Policy. FCIA never told

anyone at Nu-Air or Intercredit that it would increase the aggregate limit above $200,000.

66. On March 5, 1982, Intercredit forwarded to Nu-Air a copy of FCIA's quote for a Master Policy for Nu-Air.

67. On or about March 10, 1982, Nu-Air received FCIA's policy quotation from Intercredit.

68. On or about March 10, 1982, Healey reviewed the quotation for a Master Policy which he received from FCIA.

69. At the time Healey reviewed the policy quotation, he was aware that the proposed policy's aggregate limit was $200,000.

70. On or about March 10, 1982, Healey, on behalf of Nu-Air, signed FCIA's quote for a Master Policy and forwarded it to Intercredit for transmittal to FCIA.

71. On or about March 10, 1982, Nu-Air submitted to Intercredit for transmittal to FCIA a check payable to FCIA in the amount of $500.00 as a premium deposit in connection with the policy's issuance.

72. Intercredit, on behalf of Nu-Air, forwarded to FCIA both the quote for a Master Policy which Nu-Air had executed and Nu-Air's $500.00 premium deposit.

73. On March 16, 1982, Intercredit submitted to FCIA a Dunn & Bradstreet report on Dukans in support of Nu-Air's SBCL application.

74. Healey understood as of March 1982, that FCIA reserved the right to withdraw or cancel the Master Policy or an SBCL at any time.

75. Healey understood in March 1982 that FCIA, in its quote to Nu-Air for a Master Policy, offered Nu-Air the opportunity to select pre-shipment insurance coverage for its transaction.

76. FCIA's pre-shipment insurance coverage, subject to its terms and its conditions, protects the insured, among other things, against FCIA's withdrawal of an SBCL prior to shipment from the United States.

77. Nu-Air elected not to purchase pre-shipment coverage in connection with the Dukans transaction because Mr. Healey deemed Nu-Air's pre-shipment risks to be small.

78. On or about March 24, 1982, Nu-Air received the FCIA Master Policy with Declarations and Endorsements. The policy did not include an SBCL endorsement.

79. The Declarations portion of Nu-Air's Master Policy contains in Item No. 3 a $20,000 discretionary credit limit. Under the policy, the Insured is authorized to enter into transactions not exceeding the amount of the discretionary credit limit pursuant to such terms as are required by the policy.

80. Item No. 7 of the Declarations in Nu-Air's Master Policy provides for a $200,000 aggregate limit of liability under the Master Policy. Article IV.C. of Nu-Air's Master Policy, which is specifically incorporated by reference in Item No. 7 of the Declarations, provides in pertinent part: "[T]he total liability of the Insurers under this policy shall not exceed the aggregate limit authorized in the Declarations." Article XI.B. of the policy provides, inter alia: "Issuance by the Insurers of notification of a Special Buyer Credit Limit shall, as of its effective date, operate to replace the Discretionary Credit Limit pertaining to *insured transactions* thereafter made to the buyer designated in the notification of a Special Buyer Credit Limit."

81. The terms of the Master Policy which FCIA, on or about March 19, 1982, issued to Nu-Air included, among other things:

    a. A discretionary credit limit of $20,000 subject to certain conditions.

    b. An aggregate limit of $200,000.

    c. A premium rate of one dollar per $100 of coverage.

82. Nu-Air's application for an SBCL in the amount of $371,530.49 exceeded the aggregate limit of the Master Policy which FCIA issued to Nu-Air.

83. Article XI.B. of Nu-Air's Master Policy provides, inter alia:

> The Insurers shall have the right at any time to add to, delete, or amend any limitation, condition, or credit limit including the right to withdraw coverage with respect to any country or buyer . . . Any

change, whether by endorsement or otherwise, shall apply only to transactions which would otherwise be *insured transactions* made on or after the effective date of such change.

84. Mohammed Aslam is a financial analyst in FCIA's Underwriting Department. He has been employed at FCIA since 1971. His duties include conducting the buyer analysis involved in processing SBCL applications.

85. Smeraldo Torchia is Assistant Vice President of Intercredit. He has been employed at Intercredit since 1981. Prior to that time, he worked at FCIA as an underwriter.

86. On or about March 17, 1982, FCIA's Underwriting Department received and logged in Nu-Air's SBCL application.

87. On or about March 19, 1982, Aslam processed Nu-Air's SBCL application.

88. On or about March 19, 1982, Aslam concluded that Nu-Air's application should be withdrawn because of his understanding that there was a Nigerian government ban on imports.

89. On or about March 19, 1982, Aslam verbally informed Torchia of Intercredit that FCIA was withdrawing Nu-Air's SBCL application.

90. Intercredit's custom and practice in March 1982, was to inform a client immediately upon receipt of any written or verbal information from FCIA regarding withdrawal or cancellation of the client's SBCL.

91. Torchia's custom and practice in March 1982 was to communicate to the client immediately any information which he received from an insurance company regarding the client's application or policy.

92. Torchia advised Aslam on or about March 11, 1982 that he (Torchia) would notify Nu-Air that FCIA had rejected Nu-Air's SBCL application.

93. On April 2, 1982, FCIA issued written notification to Nu-Air and Intercredit that Nu-Air's application for an SBCL was considered withdrawn because of import restrictions imposed by the Nigerian government.

94. Following receipt of written notification from FCIA that Nu-Air's SBCL application had been withdrawn, Intercredit asked FCIA to review Nu-Air's application.

95. On or about April 12, 1982, Nu-Air received FCIA's written notification that Nu-Air's SBCL application had been withdrawn.

96. Nu-Air telephoned Intercredit immediately upon getting the notice of rejection from FCIA and advised Intercredit that (a) the order for custom made windows from Dukans was accepted solely on the strength of FCIA's approval of Nu-Air's SBCL application for Dukans, insuring approximately one-half of the value of the order; (b) Dukans had been advised by Nu-Air on or about March 3, 1982, that the order for custom made aluminum windows and doors in the amount of $630,137.20 was accepted and would be fabricated, placed in containers and loaded for shipment on or about April 30, 1982, to Nigeria; (c) the payment terms of the order were 50% letter of credit and 50% sight draft, with the FCIA credit insurance covering the sight draft part of the order, and that Nu-Air had to ship the entire order in the amount of $630,137.20 in order to collect the 50% portion of the sale covered by the letter of credit; (d) a substantial part of the order had already been manufactured, and 8 containers out of a total of 12 had already been transported to Jacksonville, Florida, where arrangements had been made to ship the material on the "Seki Rolette" vessel on or about April 30, 1982; and (e) the order was custom made to Dukans' specifications and had little salvage value.

97. On or about April 12, 1982, Ferry verbally asked FCIA to reconsider Nu-Air's SBCL application because Nu-Air had satisfied Nigerian import requirements.

98. On April 12, 1982 Ferry told Healey that she was already aware of FCIA's refusal to issue an SBCL to cover the Nu-Air sale to Dukans.

99. On or about April 12, 1982, Ferry informed Nu-Air that any shipments which Nu-Air made to Dukans would not be covered by FCIA insurance.

100. On or about April 12, 1982, in response to Ferry's request that FCIA review Nu-Air's SBCL application, FCIA reviewed its underwriting analysis of Dukans.

101. On or about April 13, 1982, FCIA verbally informed Intercredit of its decision to reject Nu-Air's SBCL application.

102. On or about April 15, 1982, FCIA Underwriting Manager, Eric Krauss, sent Ferry a written explanation regarding FCIA's denial of Nu-Air's SBCL's application for its transaction with Dukans.

103. Between April 12 and April 30, 1982, Ferry and Healey had at least one conversation in which Ferry advised Healey of Ferry's position that Nu-Air did not have coverage for its transaction with Dukans, that FCIA had the right to withdraw coverage prior to shipment from the United States and that Nu-Air should not ship to Dukans.

104. Nu-Air, on or about April 30, 1982, shipped from the United States the goods that it had sold to Dukans.

105. Nu-Air, on May 11, 1982, wrote Intercredit that the complete order for Dukans was completed and loaded on April 30, 1982, which was within the time frame of the original Form M (Import Permit). Nu-Air further advised Intercredit that payment of the premium due for this shipment would be made on the statement due May 15, 1982.

106. On or about May 18, 1982, Nu-Air forwarded FCIA its check in the amount of $3,128.15, along with a shipping report which included the aforedescribed Dukans shipment insuring the amount of $311,910.00.

107. Dukans, on or about July 13, 1982, advised Nu-Air by letter that the aforedescribed shipment arrived and the material was in good order.

108. Prior to September 1984, Healey never saw the April 15, 1982 letter from Krauss to Ferry.

109. The sight drafts issued by Dukans to pay for 50% of its order from Nu-Air became due no earlier than August 2, 1982, but no later than August 15, 1982. Dukans' failure to make payment to Nu-Air by the August 1982

due date of the sight drafts constituted a default under the FCIA Master Policy.

110. Nu-Air, on or about August 24, 1982, cabled Dukans requesting the status of the sight drafts and on September 15, 1982, requested payment of the sight drafts, which were due no earlier than August 2, 1982, but no later than August 15, 1982. Nu-Air thereafter made numerous demands for payment from Dukans, who repeatedly promised to pay Nu-Air, but failed to do so.

111. On or about April 11, 1983, Nu-Air mailed to FCIA a Notice of Claim and Proof of Loss form alleging that Dukans had failed to make payment under the sight draft for the windows and doors Nu-Air had shipped to Dukans, which documents FCIA received April 18, 1983.

112. In its Notice of Claim and Proof of Loss form, Nu-Air alleged that Dukans owed $311,846.32 to Nu-Air stemming from Dukans' default on its sight drafts.

113. On or about May 18, 1983, FCIA denied Nu-Air's claim.

114. The phrase "insured transaction" is defined in Article III of Nu-Air's Master Policy, in pertinent part, as "a sale or sales approved by the Insurers on the conditions specified in the declarations, provided the products sold are: 1. shipped from the United States during the policy period specified in the declarations such shipment to begin when the products in question are placed en route to the buyer on the order of the Insured or any of its agents."

115. The sales contract entered into by Nu-Air and Dukans does not mention Nu-Air's acquisition of FCIA export credit insurance as a condition of the sale.

116. Nu-Air and Dukans never entered into any written agreement that a condition of the sale of aluminum windows and doors to Dukans was conditioned upon Nu-Air's receipt of FCIA export credit insurance.

117. The cost of the raw materials required to manufacture the Dukans order equalled approximately 60% of the purchase price.

118. The cost of the labor required to manufacture the Dukans order equalled approximately 10% of the purchase price.

119. Nu-Air made no effort to sell the goods manufactured for the Dukans order to another purchaser after Intercredit informed Healey that FCIA had withdrawn its SBCL policy application.

120. Nu-Air at the time it received cancellation of the coverage from FCIA: (a) had finished manufacturing a substantial portion of the aforedescribed order and had already shipped 8 out of the total 12 containers to the Port of Jacksonville, Florida; and (b) would have lost the opportunity of receiving the sum of $318,290.88, which represented that part of the order secured by Letters of Credit if the order was not shipped.

121. Nu-Air never attempted to renegotiate its sales agreement with Dukans after it received notification that FCIA had withdrawn Nu-Air's SBCL application.

122. Nu-Air's custom and practice in March 1982 was to order raw materials automatically when inventory dropped below a set level for each item.

123. Nu-Air, both prior to and subsequent to March 4, 1982, made purchases of the same raw materials which it used in connection with the Dukans order.

124. All of the products which Nu-Air sold to Dukans are listed in Nu-Air's product catalogue, and were sold in 1982 in the normal course of Nu-Air's business.

125. Subsequent to Nu-Air's sale to Dukans, Nu-Air received orders for windows and doors identical to some of those which were involved in the Dukans transaction.

126. Nu-Air's Master Policy provides in Article VI.F that the Insured agrees "to use all reasonable measures to prevent or minimize *loss* hereunder and take all reasonable steps to effect *recoveries*" [emphasis in original].

127. Dukans in February 1984 made payments against four of its drafts by depositing Nigerian currency equivalent at the time to $101,566.51 in Nu-Air's account at Nu-Air's Nigerian correspondent bank.

128. Dukans informed Nu-Air in March 1984 that it had made payment in Nigerian currency to Nu-Air against

four additional drafts by depositing the monies in Nu-Air's account at Nu-Air's Nigerian correspondent bank.

129. First National Bank of Florida has informed Nu-Air that Nigerian currency covering eight of the invoices involved in the Dukans sale has been deposited in a Nigerian bank.

130. Article VI.C. of the Master Policy provides:

> The insured agrees:
>
> * * *
>
> B. to notify the Insurers in writing, within 15 calendar days of actual knowledge thereof, of financial difficulty of any buyer rendered an *insured transaction*, or of the occurrence of any risks enumerated in Article II hereof likely to cause a *loss* hereunder with respect to such buyer. [Emphasis in original and indicates terms defined elsewhere in the policy.]

131. Until Nu-Air filed in February 1983 its Overdue Accounts Report for January 1983, Nu-Air had not notified FCIA that Dukans had defaulted in August 1982 on Dukans [sic] obligation under the sight drafts.

132. Article V.D. of Nu-Air's Master Policy provides that the insured agrees:

> D. To record on the Overdue Accounts Report Form all amounts due the Insured from buyers which at the end of the previous month were wholly or partly unpaid for more than 90 days from the *due date* (whether or not previously reported as overdue) and to record each month thereafter all amounts which continue to be wholly or partly unpaid, unless and until a claim is filed in connection with such unpaid amounts [Emphasis in original.]

133. Nu-Air reported to FCIA Dukans' default on the sight drafts in Nu-Air's Overdue Accounts Report dated February 12, 1983 covering the reporting period for January 1983.

134. Article VI. of the policy provides, *inter alia*, that

> "The Insured agrees;
>
> E. to use all reasonable measures to prevent or minimize *loss* hereunder and take all reasonable

steps to effect *recoveries* including, if required by and at the expense of the Insurers (subject to the provision of Article X), enforcement of any security and institution of legal proceedings in the name of the Insured against either the buyer or any guarantor or both."

135. Article XI. provides as follows:

"I. Compliance by Insured

Failure by the Insured to comply with any term or condition of this policy shall not be deemed to have been excused or accepted by the Insurers unless the same is specifically so excused or accepted by an officer of the Insurer in writing."

136. Nu-Air was compelled to and did employ David Hyman, P.A., to institute this action to collect $280,661.68 plus interest, costs and attorney's fees for said loss and has agreed to pay its attorney a reasonable fee for said services.

137. Article VI. of the policy provides, *inter alia*, that

"The Insured agrees:

A. to pay the premiums in the amounts specified in the declarations in accordance with the terms set forth therein;"

138. Article XI.C.1. of Nu-Air's policy provides that,

"The Insured shall declare the gross *invoice value* of all shipments under *insured transactions* on the applicable report form provided by the Insurers and shall submit the premium for such shipments on or before the 15th day of the month following each reporting period. The Insured agrees to submit such report form even if no shipments under *insured transactions* are made during any reporting period." [Emphasis in original.]

139. Item No. 8.3 of Nu-Air's policy provides,

"The Insured shall declare the *gross invoice value* of all shipments under *insured transactions* on the applicable report form provided by the Insurers and shall submit the premium for such shipments on or

before the 15th day of the month following each reporting period. The Insured agrees to submit such report form even if no shipments under *insured transactions* are made during any reporting period." [Emphasis in original.]

140. Item No. 9 of Nu-Air's policy provides,

"All shipments of all products stated in the application made a part hereof which qualify as *insured transactions* shall be declared and the appropriate premium paid thereon." [Emphasis in original.]

141. Article V. of the policy provides that,

"The Insureds shall not be liable for any loss:

* * *

L. if the Insured has failed to compy with any term and condition of the Application, Declarations or Policy including Endorsements and Special Conditions;"

142. Article XI.J. of the policy provides that,

"1. If the Insured fails to file any shipment report, to declare any shipment, or to pay any premium when due, the Insurers may at their option:

a) terminate the policy as of the date such shipment report, or declaration, or premium payment was due by giving the Insured written notice of such termination; or

b) continue the policy in force for the remainder of the policy period, or any part thereof and hold the Insured liable for payment of premium to the end of the policy period or to any earlier date elected by the Insurers."

143. Article IV.B. of the policy provides that,

"B. The amount of the credit limit for any particular buyer shall be:

1. The amount of the Discretionary Credit Limit authorized in the declarations; or

2. such other amount as the Insurers shall approve by written notification to the Insured of a Special Buyer Credit Limit."

CONCLUSIONS OF LAW

A) Whether or not FCIA advised Intercredit, on March 3, 1982, orally, that FCIA had approved Nu-Air's application for an SBCL, and/or orally advised said parties of the withdrawal of the alleged coverage prior to the written notification of April 12, 1982, the clear language of the policy enabled FCIA to withdraw said coverage. Furthermore, the explicit requirements for written notification preclude this Court's holding that the SBCL was approved.

B) FCIA's liability under the policy it issued to Nu-Air, in the event of non-payment by Dukans, did not accrue prior to FCIA's withdrawal of coverage for the Dukans transaction.

C) Nu-Air did not have coverage under its policy for the eight containers shipped to Jacksonville prior to April 12, 1982, or thereafter.

D) Nu-Air's reliance on Intercredit's alleged March 3, 1982 statement that FCIA had approved Nu-Air's application for an SBCL was not reasonable where Nu-Air knew that FCIA's aggregate limit of liability under the policy was $200,000.

E) Assuming FCIA advised Intercredit on or about March 3, 1982, that FCIA had apprpved [sic] Nu-Air's application for an SBCL for the Dukans transaction, Intercredit's reliance on FCIA's statement was not reasonable where Intercredit was aware that the policy's aggregate limit was $200,000.

F) Nu-Air's failure, until February 1983, to report to FCIA Dukans' default on an FCIA Overdue Accounts Report, or otherwise, bars Nu-Air from recovering against FCIA under the policy where Nu-Air was aware on or about August 31, 1982, that Dukans had defaulted on its obligation to make payment to Nu-Air on the sight drafts, no earlier than August 2, 1982, but no later than August 15, 1982.

G) FCIA was acting within its authority as the agent of the Export-Import Bank of the United States, and is immune from suit under Nu-Air's negligent misrepresentation claim.

H)Nu-Air's failure to mail, prior to April 11, 1983, a Proof of Loss/Notice of Claim form, which FCIA received on April 18, 1983, bars Nu-Air's recovery here.

I) Intercredit had no authority to secure or maintain export credit insurance. It clearly had authority to act only as Nu-Air's broker.

J) Even if Intercredit did orally advise Nu-Air that said SBCL would be approved, said representation would not be negligent where Nu-Air received oral notification of policy limits so as to negate said coverage, and said policy clearly did not provide such coverage and clearly contained a provise [sic] to withdraw said coverage prior to shipment, and Nu-Air clearly elected not to have pre-shipment coverage.

Accordingly, it is

ORDERED that the motions for summary judgment be, and hereby are, granted. The Clerk of this Court is directed to enter judgment in accord with this Order; entering judgment in favor of FCIA and Intercredit, and against Nu-Air. The motion to strike is rendered moot by this determination.

DONE and ORDERED in Chambers, in Tampa, Florida, this 20th day of December, 1985.

.....

ELIZABETH A.
KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

Rule 28.1 List

The following is a list of the member companies of FCIA, named defendants herein, during the time period relevant to this dispute.

Aetna Casualty and Surety Co., Inc.
Aetna Insurance Co.
American Home Insurance Co.
American Mutual Liberty Insurance Co.
Atlantic Mutual Insurance Co.
Commercial Union Insurance Co.
Continental Casualty Co.
The Continental Insurance Company
Employers Mutual Insurance Co. of Wisconsin
Federal Insurance Co.
Fireman's Fund Insurance Co.
The Hanover Insurance Co.
Hartford Accident and Indemnity Co.
The Home Insurance Co.
Insurance Co. of North America
Liberty Mutual Insurance Co.
Lumbermens Mutual Casualty Co.
Reliance Insurance Co.
Royal Indemnity Co.